No. 93-144-CFX
Status: GRANTED

Title: Department of Revenue of Montana, Petitioner
v.
Kurth Ranch, et al.

Docketed:
July 28, 1993

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Van Tricht,Paul

Counsel for respondent: Goetz,James, Maristuen,Keith A.

Entry	Date	Note	Proceedings and Orders
1	Jul 28 1993	G	Petition for writ of certiorari filed.
2	Jul 28 1993		Appendix of petitioner filed.
3	Aug 23 1993		Brief of respondents Kurth Ranch, et al. in opposition filed.
4	Aug 25 1993		Brief amici curiae of Kansas, et al. filed.
5	Sep 1 1993		DISTRIBUTED. September 27, 1993
6	Sep 23 1993	X	Reply brief of petitioner filed.
7	Sep 28 1993		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.
			**********
8	Oct 22 1993		Record filed.
		*	Original proceedings United States District Court for the District of Montana (BOX)
9	Oct 22 1993		Record filed.
		*	Original proceedings United States Bankruptcy Court for the District of Montana (BOX)
10	Oct 26 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
11	Nov 1 1993	G	Motion of petitioner to dispense with printing the joint appendix filed.
12	Nov 8 1993		Motion of petitioner to dispense with printing the joint appendix GRANTED.
15	Nov 8 1993		Brief amici curiae of Arizona, et al. filed.
13	Nov 9 1993		Brief of petitioner Department of Revenue of the State of Montana filed.
14	Nov 9 1993		Brief amicus curiae of United States filed.
18	Nov 18 1993		CIRCULATED.
16	Nov 19 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Nov 22 1993		SET FOR ARGUMENT WEDNESDAY, JANUARY 19, 1994.(2ND CASE).
19	Dec 6 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

No. 93-144-CFX

Entry	Date	Note	Proceedings and Orders
20	Dec 7 1993	X	Brief of respondents Kurth Ranch, et al. filed.
21	Dec 21 1993	X	Reply brief of petitioner filed.
22	Jan 13 1994		RECEIVED from respondents. Publication by Montana Department of Revenue entitled "TAXES, Base of Government services," dated January 1993.
23	Jan 19 1994		ARGUED.

No. _____

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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July 1993

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QUESTION PRESENTED

In direct conflict with a prior decision of the Montana Supreme Court, the court of appeals held that a tax assessment under the Montana Dangerous Drug Tax violated the double jeopardy provisions of the United States Constitution.

The question presented is:

Can assessment of a state tax on the possession and storage of dangerous drugs, imposed separate and apart from any criminal penalty, violate the double jeopardy prohibitions of the Fifth and Fourteenth Amendments to the United States Constitution?

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993) and is reprinted in the Appendix at 1. The opinion of the district court, *Drummond v. Dept. of Revenue*, No. CV-90-084-PGH, 1991 WL 365065 (D. Mont., April 23, 1991) is unreported, and is reprinted in the Appendix at 13. The opinion of the bankruptcy court is reported in *In re Kurth Ranch*, 145 B.R. 61 (Bankr. D. Mont., May 8, 1990), and is reprinted in the Appendix at 24.

The opinion of the Montana Supreme Court, which conflicts with the decision of the court below, is reported in *Sorenson v. Montana Dep't of Revenue*, 254 Mont. 61, 836 P.2d 29 (1992) and is reprinted in the Appendix at 62.

JURISDICTION

The decision of the court of appeals was entered February 26, 1993. A Petition for Rehearing with Suggestion for En Banc Rehearing was filed pursuant to Rules 35 and 40, Fed. R. App. P. That petition was treated as timely and denied on May 3, 1993. The order denying rehearing is reprinted in the Appendix at 78. The petition also was treated as timely by the clerk of this Court. Appendix at 80. This Petition for Certiorari was filed within 90 days of the date of denial of the petition for rehearing. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the constitutionality of a tax assessment under the Montana Dangerous Drug Tax Act, Mont. Code Ann. §§ 15-25-101 through 123 (1987). This tax is on the possession or storage of dangerous drugs including marijuana. The part of the tax at issue provides:

> "[T]he tax on possession and storage of dangerous drugs is the greater of: (a) 10% of the assessed market value of the drugs, as determined by the [Montana Revenue] department; or (b)(i) $100 per ounce of marijuana . . . "

The entire dangerous drug tax is set out in the Appendix at 82.

The provision of the United States Constitution involved in this case is the double jeopardy provision of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment. The Fifth Amendment is set forth in full in the Appendix at 88.

STATEMENT OF THE CASE

The extended Kurth family was in the marijuana growing business in central Montana. In October 1987 this operation was discovered and 2,155 marijuana plants, 1,881 ounces of harvested marijuana and several gallons of marijuana derivatives were seized by law enforcement officials. Petitioner Montana Department of Revenue ("Department") assessed the Kurths under the Montana Dangerous Drug Tax Act.

In July 1988 the Kurths pled guilty to state criminal charges and were sentenced in state court. The Kurths then filed voluntary bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, *et seq.* (1985).[1] That bankruptcy later was converted to a Chapter 7 bankruptcy. The Department filed a proof of claim for the drug tax assessment. The Department's claim was challenged by the Kurths and the trustee in bankruptcy. Jurisdiction of the bankruptcy court over this dispute was under the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* and the Judiciary Act, 28 U.S.C. 281 *et seq.* (the "Bankruptcy Amendments and Federal Judgeship Act of 1984" as amended).

Following a bench trial in the adversary proceeding, the bankruptcy court found $208,105 due in drug tax.[2] However, relying on this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989), the bankruptcy court determined that the tax assessment was a "second punishment" for conduct (possessing marijuana) for which the Kurths had previously been criminally punished, and that the tax assessment violated the double jeopardy clause of the Fifth Amendment. The bankruptcy court therefore denied the Department's claim. (App. 24).

The Department appealed the decision of the bankruptcy court to the United States District Court for the District of Montana under its appellate jurisdiction, 28

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[1] The debtors included the individual members of the Kurth family. The Kurth Ranch and Kurth Halley Cattle Company were family owned corporations.

[2] At this time, there remains over $120,000 in this estate after payment of the trustee's attorney's fees to date.

U.S.C. § 158 (1988). The district court affirmed the decision of the bankruptcy court. (App. 13). The Department appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, which affirmed the decision of both the bankruptcy court and the district court. (App. 1). The court of appeals' appellate jurisdiction is found in 28 U.S.C. § 158(c) & (d) (1988). The Department is petitioning for review of the decision of the court of appeals.

ARGUMENT

A. The Decision of the Ninth Circuit Directly And Irreconcilably Conflicts with a Decision of the Montana Supreme Court.

Montana has a tax on the possession or storage of dangerous drugs including marijuana. Mont. Code Ann. §§ 15-25-101, *et seq.* (1987) (App. 80). The tax on marijuana is $100 per ounce. In the case of *Sorenson v. Montana Dep't of Revenue*, 254 Mont. 61, 64-68, 836 P.2d 29, 30-33 (1992) (App. 62), the Montana Supreme Court held that the tax of $100 per ounce on marijuana was an excise tax and not a punishment, expressly rejecting the rationale for the decisions of the bankruptcy court and the district court in this case.

Like the Kurths, the taxpayers in *Sorenson* were convicted of criminal violations of Montana's dangerous drug law for possessing drugs, including marijuana, and were assessed taxes under the Montana Dangerous Drug Tax. The Montana Supreme Court, applying this Court's holdings in *United States v. Ward*, 448 U.S. 242 (1980) and

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), held that the tax was an excise tax and not a second form of criminal punishment. 836 P.2d at 31-32 (App. 62). The Montana court then rejected the argument accepted by the court of appeals in this case, distinguishing *Halper* because that "rare" case, 490 U.S. at 449, involved a fixed penalty rather than an excise tax. When it decided *Sorenson*, the Montana Supreme Court was fully aware of the contrary decisions by both the bankruptcy court and the federal district court in this case. 836 P.2d at 34 (Hunt, J., dissenting) (App. 62).

At issue in this case is a similar tax assessment of $100 an ounce on marijuana under the Montana Dangerous Drug Tax. Contrary to the Montana Supreme Court, the court of appeals held that Montana's tax on marijuana was a punishment and "the tax assessment levie[d] by [the Montana Dept. of] Revenue in this case constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause." (App. 11-12). The court of appeals relied on the *Halper* decision but did not distinguish its decision from that of the Montana Supreme Court in *Sorenson*.[3] Indeed,

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[3] *Halper* and similar subsequent decisions by this Court are not relevant to the issue presented in this petition. In *Halper* there was no question that the law at issue was a penalty. The federal law in question, 31 U.S.C. §§ 3729-3731 (the False Claims Act) expressly provided a "civil penalty of $2,000" for each false claim. Similarly, *Austin v. United States*, ___U.S.___, 61 U.S.L.W. 4811 (U.S. June 28, 1993) is not relevant to this petition. In *Austin* the issue was whether the excessive fines clause of the Eighth Amendment applied to statutory forfeitures of property. In this case the central issue is whether the Montana tax on marijuana is a "penalty" or "punishment" for purposes of the double

during its discussion of *Sorenson* the court of appeals expressly disagreed with the Montana Supreme Court's analysis. In a footnote, the court of appeals stated:

> In fact, the [Montana Supreme] [C]ourt did not believe *Halper* was implicated at all: "a tax requires no proof of remedial costs on the part of the state." [836 P.2d 29, at 33]. The [Montana Supreme] Court also noted that its tax was "comparable to those in other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act . . . As we have noted, this ignores the particularized double jeopardy inquiry required under *Halper*.

986 F.2d at 1312, n.2. (App. 11).

The Montana Supreme Court held the tax on marijuana is not a penalty and that there is no need to make a showing of remedial costs to enforce the tax. *Sorenson*, 836 P.2d at 33 (App. 72). An assessment under that tax thus does not violate the double jeopardy clause. The court of appeals, in direct conflict, said the tax on marijuana is a penalty or punishment and an assessment under that tax can violate the double jeopardy clause without a showing of "damages" by the government. 986 F.2d at 1312 (App. 11).

This Court has frequently granted the writ to resolve conflicts between a ruling of a court of appeals and a decision of a state supreme court on constitutional issues.

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jeopardy clause of the Fifth Amendment. **It is the conflict between the Montana Supreme Court and the court of appeals over whether the Montana tax is a punishment or not that is the issue presented in this petition.**

See, e.g., Andresen v. Maryland, 427 U.S. 463, 470 n.5 (1976). The conflict is especially intolerable here, because under the Tax Injunction Act, 28 U.S.C. § 1341 (1988), challenges to the validity of a state tax ordinarily must be resolved in state court proceedings. The Kurths were able to place this issue before the federal courts only because they were involved in a proceeding before the federal bankruptcy court. For taxpayers who are not involved in a bankruptcy, like the taxpayers in *Sorenson*, the Montana Supreme Court's decision governs, while bankrupt taxpayers may seek protection in federal bankruptcy court based on the ruling of the court of appeals in this case.

This Court's certiorari jurisdiction serves to ensure uniformity in the application of the United States Constitution. Unless the court of appeals or the Montana Supreme Court subsequently modifies its position on the Montana tax, the identical issue will be decided differently from case to case merely on the basis of the forum in which the issue is litigated. The Court must grant the writ and review the decision of the court of appeals to secure for Montana taxpayers a uniform application of Fifth Amendment principles to the tax at issue here.

B. The Circuit Court's Decision Conflicts With Decisions of This Court and Other Circuits.

Over twenty years ago the federal government had an excise tax of $100 per ounce on marijuana.[4] That tax

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[4] In 1950 the marijuana "transfer tax" was codified in the Internal Revenue Code (26 U.S.C. § 2590) (1946 ed.):

was similar to the Montana tax at issue. A number of federal court decisions, including several by this Court, addressed the issue of whether the federal tax on marijuana was a true tax or some type of punishment.

Various federal courts have held the federal tax of $100 per ounce on marijuana was a true tax and not a penalty or punishment. In *United States v. Sanchez*, 340 U.S. 42 (1950), this Court upheld the federal Marijuana Tax Act against a challenge similar to that accepted by the court of appeals. The Court reasoned that the statute had several proper purposes, including raising revenue, and that the Marijuana Tax "di[d] not cease to be valid merely because it regulate[d], discourage[d], or even definitely deter[red] the activities taxed." 340 U.S. at 44. This Court

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Tax.

(a) Rate – There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers – Upon each transfer to person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others – Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, **$100 per ounce of marijuana or fraction thereof** . . .

This transfer tax was in addition to the marijuana "occupational tax" in section 3230 on "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marijuana . . . " These taxes were last codified as 26 U.S.C. §§ 4741 et seq. (1954). The taxes were repealed in 1971 in Pub.L. 91-513.

further stated that "[t]he tax in question [of $100 per ounce of marijuana] is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect. . . . " 340 U.S. at 45. *See also Minor v. United States*, 396 U.S. 87, 98 (1969) decided with *Buie v. United States*, 396 U.S. 87 (1969).

Two circuit courts of appeal, and the court of claims, following *Sanchez*, upheld the $100 per ounce federal marijuana tax and held the tax was not a penalty: *Frey v. United States*, 558 F.2d 270 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *Simmons v. United States*, 476 F.2d 715 (10th Cir. 1973) (total marijuana tax & interest of $567,393.58); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1973); and *Cancino v. United States*, 451 F.2d 1028 (Ct. Cl., 1971), *cert. denied*, 408 U.S. 925 (1972). The Montana Supreme Court relied upon these federal decisions in *Sorenson*.[5]

The decision of the court of appeals in this case irreconcilably conflicts with these federal decisions. As noted above, the court of appeals dismissed the Montana Supreme Court's reliance on those federal decisions. The court of appeals gave no reason why a federal tax of $100 per ounce on marijuana is a true excise tax, while a state tax of $100 per ounce is a penalty. It did not distinguish its decision from those of other federal courts of appeal. The conflict between the court of appeals' decision here and the decisions of this Court in *Sanchez* and of the fifth

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[5] These federal decisions were written before *Halper* and therefore, did not analyze the federal marijuana tax under the double jeopardy clause. However, the federal courts did clearly hold that the tax was not a punishment.

and tenth circuits and the court of claims in *Frey, Simmons, Alvero,* and *Cancino,* is grounds for granting the writ in this case.

C. The Ninth Circuit's Decision Conflicts With Decisions of Other State Courts of Highest Appeal.

There are over twenty other states which directly tax marijuana by some tax other than their general sales or income tax. These states are listed in the Appendix at 89. The issue in this case has been before a number of state appellate courts, which have uniformly rejected the analysis adopted by the court of appeals here.

The following decisions have upheld a tax on dangerous drugs and held that assessment of the tax itself did not violate the double jeopardy provision of the federal Constitution under this Court's decision in *Halper*: *Hyatt v. State Dept. of Revenue,* 597 So. 2d 716 (Ala. Civ. App. 1992) (total assessment of $198,000 for 494.5 grams of cocaine); *Birney v. State,* 594 So. 2d 120 (Ala. Civ. App. 1991) (tax of $80,000 on 989 dosage units of LSD); *Harris v. State Dept. of Revenue,* 563 So. 2d 97 (Fla. Dist. Ct. App. 1990); *Rehg v. The Illinois Department of Revenue,* 605 N.E.2d 525 (Ill. 1992); *State v. Berberich,* 811 P.2d 1192 (Kan. 1991); and *State v. Riley,* 166 Wis. 2d 299 (Wis. Ct. App. 1991) (total assessment of $89,816 on 217 grams of cocaine).[6] These decisions were brought to the attention of the federal courts below. The decision of the court of

[6] *Harris* and *Rehg* relied, as the Montana Supreme Court did in *Sorenson,* upon this Court's decision in *Sanchez.*

appeals expressly and directly conflicts with those decisions. This Court should grant the petition to resolve these conflicts.

D. The Decision of the Court Below is of Exceptional Importance Because it will Impact Taxes in Over Twenty Other States.

The court of appeals' decision will affect the administration of the drug taxes in over twenty states (App. 89), and therefore presents a question of national importance. The opinion below also applies the decision of the United States Supreme Court in *Halper* for the first time to state taxes despite this Court's expressed admonition that the *Halper* decision was "a rule for the rare case, where a *fixed-penalty* provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449 (emphasis added).[7]

This Court's decision in *Halper* was expressly confined to "rare" cases. In that decision, this Court did not expand the traditional tests for judging state taxes nor did this Court give federal courts new powers to inquire into the supposed purpose of a state legislature when it

[7] Prior to *Halper,* many observers believed that the double jeopardy prohibitions against multiple punishments did not extend to civil sanctions. Thus, *Halper* has been called a "depart[ure] from fifty years of double jeopardy jurisprudence." Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings after United States v. Halper,* 76 Univ. Va. L. Rev. 1251 (1990).

enacted a tax. In a concurring opinion in *Halper*, Justice Kennedy emphasized the limits of that decision:

> Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. *It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding.* [Citation omitted] Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name.

Halper, 490 U.S. at 453 (emphasis added). It is respectfully submitted the decision of the court of appeals was the type of broad inquiry "into the subjective purposes" behind the Montana Drug Tax which is clearly inappropriate under *Halper*. The court of appeals' expansive reading of *Halper* warrants review.

CONCLUSION

The decision of the court of appeals is flatly contrary to decisions of the Montana Supreme Court and other state courts of appeal. The conflicts are irreconcilable. The court of appeals' decision also is contrary to decisions of this Court and other federal courts on a similar federal tax on marijuana and expands this Court's decision in *Halper* far beyond its expressed limitations.

Therefore, the Petitioner respectfully urges that the Court grant its Petition for a Writ of Certiorari and

reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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July 1993

No. 93-141

In The

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DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. KURTH; JUDITH KURTH, husband and wife; et al., *Debtors,*	No. 91-35878 D.C. No. CV-90-084-PGH OPINION
ROBERT G. DRUMMOND, Trustee, *Appellee,* v. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Appellant.*	

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
August 19, 1992 – Seattle, Washington

Filed February 26, 1993

Before: Eugene A. Wright, Robert R. Beezer, and Edward Leavy, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Criminal Law and Procedure/Double Jeopardy/Due Process/Individual Rights/Constitutional Rights/ Narcotics/Defendants and Accused, Rights of/Civil Litigation and Procedure/Bankruptcy/Claims/Tax/ Litigation and Procedure (Civil)

The court of appeals affirmed a judgment of the district court. The court held that where there has been a separate criminal conviction for marijuana possession, double jeopardy precludes a subsequent action to collect a tax on that marijuana unless there is a demonstrated rational relationship between the sanction imposed and the damages suffered by the government.

The Kurth family began cultivating marijuana to pay off a debt against the family farm. A law enforcement raid on the farm resulted in the seizure of large quantities of plants, harvested crop and marijuana derivatives. The Kurths were charged with criminal possession and sale. They pleaded guilty and received individual sentences. Following their arrests, appellant Department of Revenue of the State of Montana assessed a drug tax against the Kurths totalling approximately $865,000, pursuant to the Dangerous Drug Tax Act. Following their convictions, the Kurths filed a voluntary petition in bankruptcy. The Department of Revenue filed a claim with the bankruptcy court which was challenged by the Kurths and by the trustee in bankruptcy. The bankruptcy court denied the Department's claim, finding after a bench trial that as applied to the Kurths the tax impermissibly punished them a second time in violation of the double jeopardy clause. The district court affirmed the bankruptcy court's

order. In both bankruptcy and district court, the Department declined to make a showing regarding the costs incurred in enforcing the dangerous drug laws.

[1] The double jeopardy clause of the Constitution protects against multiple punishments for the same offense. [2] A disproportionately large civil sanction imposed in a civil proceeding subsequent to a criminal conviction for the same conduct may constitute punishment prohibited by the double jeopardy clause. [3] The label the state gives to the sanction, e.g. tax, is not dispositive on the question of impermissible second punishment, which requires a particularized assessment of the penalty imposed and the purposes that penalty may fairly be said to serve. [4] Punishment serves the aims of deterrence and retribution. Where a civil sanction cannot fairly be said to serve only a remedial purpose, but can be explained only as also serving deterrent or retributive purposes, it is punishment. [5] Proper analysis in such circumstances requires the trial court to determine whether there is a rational relationship between the sanction imposed and the damages suffered by the government. [6] Without evidence justifying imposition of the tax, the tax as applied to the Kurths constitutes an impermissible second punishment in violation of the double jeopardy clause.

COUNSEL

Paul Van Tricht, Special Assistant Attorney General, Helena, Montana, for the appellant. Joseph Brian Cox, Special Assistant Attorney General, Topeka, Kansas, Amicus Curiae States of Kansas, Florida, and Texas, for the appellant.

James H. Goetz and Brian K. Gallik, Goetz, Madden & Dunn, Bozeman, Montana, for the appellee.

OPINION

BEEZER, Circuit Judge:

We consider whether Montana's Dangerous Drug Tax Act violates the Fifth Amendment's proscription against double jeopardy.

The district court for the district of Montana affirmed the bankruptcy court's ruling that a $100-an-ounce marijuana tax levied pursuant to the Act violated the Fifth Amendment. The Montana Department of Revenue ("Revenue") appeals, arguing that the drug tax is not a punishment and that its imposition against the Kurths does not violate double jeopardy. The Kurths maintain that a criminal penalty by any other name is still a criminal penalty, and that the district court properly relied on *United States v. Halper*, 490 U.S. 435 (1989) in holding the drug tax as applied is unconstitutional. We affirm.

I

The extended Kurth family entered the marijuana-growing business "with but one purpose – that of making large sums of money just as fast as possible in order to pay off a large debt against the family farm." *Montana v. Kurth*, No. DC-87-018 Judgment and Sentencing Order at 3 (Mont. 12th Dist. Ct., July 18, 1988).

The Kurths cultivated marijuana for about a year and a half before discovery by law enforcement officials. On October 18, 1987, offices raided the farm and seized 2155

marijuana plants, 1811 ounces of harvested marijuana and several gallons of marijuana derivatives. They also arrested the Kurths, who were subsequently charged with the criminal possession and sale of dangerous drugs.

Shortly before the Kurths' arrests, Montana's Dangerous Drug Tax Act was enacted. *See* Mont. Code Ann. §§ 15-25-101 through 123 (1987).[1] The arresting officer's Drug Tax Report describing the substances found at the Kurth farm was the first ever sent to the Montana Department of Revenue. Pursuant to the Act, Revenue assessed a drug tax against the Kurths. The assessment ultimately totaled nearly $865,000 for the marijuana plants, harvested marijuana, hash tar, and hash oil.

The Kurths administratively challenged both the method of computation and the legality of the assessment. This challenge was suspended pending resolution of the Kurths' criminal charges. In July 1988, the Kurths all pleaded guilty and received individual sentences.

The Kurths then filed a voluntary petition in bankruptcy under Chapter 11, again staying the administrative proceeding. In February 1989, Revenue filed an amended proof of claim with the bankruptcy court which was challenged by the Kurths and the trustee in bankruptcy.

In May 1990, following a bench trial, the bankruptcy court denied Revenue's claim. The court determined that the taxes on the plants, hash tar, and hash oil were

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[1] The Montana legislature amended this law in 1989 and again in 1991. Revenue assessed the taxes under the 1987 version. *See* Mont. Code Ann. §§ 15-25-101 through 123 (1987).

arbitrary, capricious, and violative of the drug tax statute. The court also concluded that although the remaining $208,105 tax on the harvested marijuana was computed in compliance with the statute, its application here violated the Kurths' constitutional rights; the tax assessment served to punish the Kurths a second time for conduct to which they had pleaded guilty and been punished. Relying particularly on *Halper*, the court determined that this "second punishment" violated the double jeopardy clause of the Fifth Amendment. *In re Kurth Ranch*, No. 88-40629, 289/0042, 145 B.R. 61 (Bankr. D. Mont., May 8, 1990).

The district court affirmed the bankruptcy court's order. *Drummond v. Dept. of Revenue*, No. CV-90-084-PGH, 1991 WL 365065, at *4 (D. Mont., April 23, 1991). Revenue does not challenge the bankruptcy and district court's holding that the original assessment of $865,000 was arbitrary and capricious; Revenue appeals only the determination that the $208,105 tax on the harvested marijuana is unconstitutional.

II

We review *de novo* a challenge to the constitutionality of a state statute. *Jackson Water Works, Inc. v. Public Util. Comm'n*, 793 F.2d 1090, 1092 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

[1] The Double Jeopardy Clause of the Constitution protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *United States*

v. Halper, 490 U.S. at 440. The third of these protections is at issue in this case.

[2] The multiple-punishment prohibition applies only when the State attempts to criminally punish a defendant twice for the same offense. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). The clause does not bar the State from imposing both a civil and a criminal penalty upon a defendant for the same offense, *Helvering v. Mitchell*, 303 U.S. 391 (1938), nor is the State barred from imposing a criminal and civil sanction in a single proceeding, as long as the court determines that "the total punishment [does] not exceed that authorized by the legislature." *Halper*, 490 U.S. at 450 (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)). A disproportionately large civil sanction imposed in a subsequent civil proceeding, however, may constitute "punishment" within double jeopardy's multiple-punishment prohibition. *Id.*

[3] Although the Montana statute labels the assessment as a "tax," this in itself is not dispositive as to whether this imposition constitutes an impermissible second punishment. A state cannot evade the prohibitions of the federal constitution merely by changing the label of the punishment. Indeed, " 'labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.' " *Id.* at 448 (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 (1988)). The determination whether a civil sanction constitutes punishment "requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. . . . [A] civil as well as a criminal sanction

constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*

[4] Punishment serves the twin aims of retribution and deterrence. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). The Supreme Court teaches us that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper*, 490 U.S. at 448.

The Court has succinctly described the reason for the rule:

> Where a defendant previously has sustained a criminal penalty and a civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Id. at 449-50.

[5] Under *Halper*, the double jeopardy analysis requires the trial court to determine whether there is a rational relationship between the sanction imposed and the damages suffered by the government. Although the trial court's determination may often be no more than an approximation, "even an approximation will go far towards ensuring both that the Government is fully compensated for the costs of corruption and that, as required

by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment." *Id.* at 450.

Finally, the rule in *Halper* is limited to "the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

It should be noted that *Halper*'s disproportionality analysis is required only in those cases where there has been a separate criminal conviction. A state may legitimately tax criminal activities. *See Marchetti v. United States*, 390 U.S. 39, 44 (1968). Moreover, there is no need for the civil sanction to be tied to any remedial analysis when it is imposed apart from a criminal conviction. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981).

Where the case does involve a previous criminal conviction, however, special considerations come into play. Here, the most relevant consideration is the character of the sanction and whether it may fairly be called punitive in nature. *See Halper*, 490 U.S. at 449-50. This distinguishes this case from those cited by Revenue which hold a marijuana tax to be non-punitive, but do not involve a previous criminal conviction. *See Minor v. United States*, 396 U.S. 87 (1969); *United States v. Sanchez*, 340 U.S. 42 (1950); *see also Simmons v. United States*, 476 F.2d 715, 718-19 (10th Cir. 1973).

III

The Kurths were criminally prosecuted for possession and sale of dangerous drugs. The double jeopardy analysis under *Halper* applies. If the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by Revenue, the Kurths are entitled to an accounting in order to determine if the sanction constitutes an impermissible additional punishment.

The record in this case, however, is devoid of the information necessary to make a determination of proportionality. Despite opportunities to do so before the bankruptcy and district courts, Revenue refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects.

Revenue asks us to take judicial notice of the high but incalculable cost of drug abuse on the state of Montana. Certainly, other federal courts have noted the staggering costs associated with fighting drug abuse in this country. *See United States v. A Parcel of Land with a Bldg. Located Thereon,* 884 F.2d 41, 44 (1st Cir. 1989) (discussing the "billions the government is being forced to spend" on enforcing drug laws). Indeed, the Montana Supreme Court has recently addressed this very issue and found that the marijuana tax "is not excessive in relation to the remedial purposes addressed in § 15-25-122." *Sorenson v. Montana Dep't of Revenue,* No. 91-379, slip op. at 5 (Mont. S.C. July 21, 1992).

We observe that the *Sorenson* court did not require the State to make any showing regarding its costs and

expenses.[2] Absent even a "rough" showing by the State regarding its actual costs in the case, we see no reason to question the district court's refusal to "take judicial notice" of drug abuse's general costs to society.[3]

We agree with the bankruptcy court, as did the district court, that allowing the state to impose this tax, without any showing of some rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits.

[6] By refusing to offer any evidence justifying its imposition of the tax, the State has failed to meet the threshold requirements under *Halper.* We do not hold the Montana marijuana tax is unconstitutional on its face; we do hold it is unconstitutional as applied against the Kurths. The tax assessment levied by Revenue in this case

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[2] In fact, the court did not believe *Halper* was implicated at all: "a tax requires no proof of remedial costs on the part of the state." *Id.* at 8-9. The Court also noted that its tax was "comparable to those in other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act . . . " *Id.* at 9. As we have noted, this ignores the particularized double jeopardy inquiry required under *Halper.*

[3] This case is distinguishable from *United States v. Walker,* 940 F.2d 442, 444 (9th Cir. 1991), where we upheld a district court decision that imposed a $500 sanction for importation of marijuana and that took judicial notice of the "financial burden associated with maintaining check points and administering the customs system." In the case before us, the district court refused to take "judicial notice" of the general costs of drug law enforcement, and construed *Halper* to require a more particularized showing of the actual damages to the State.

constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

IN RE: KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; et al., Debtors. ROBERT G. DRUMMOND, Trustee, Plaintiff and Appellee, vs. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Defendant and Appellant.	NO. CV-90-084-GF MEMORANDUM AND ORDER (Filed Apr. 23, 1991)

The Department of Revenue of the State of Montana ("D.O.R.") instituted the present action seeking judicial review of a May 8, 1990, order of the United States Bankruptcy Court for the District of Montana. The D.O.R. takes issue with, *inter alia*, the bankruptcy court's decision holding the tax levied on the debtors,[1] pursuant to

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[1] The debtors, hereinafter referred to as "the Kurths", refers to Richard and Judith Kurth, Douglas and Rhonda Kurth, and

the Montana Dangerous Drug Tax Act, Mont.Code Ann. §§ 15-25-101, *et seq.* (1987), was a "penalty" which violated the fifth amendment's proscription against double jeopardy. Jurisdiction vests with this court pursuant to 28 U.S.C. § 158.

PROCEDURAL HISTORY

On October 18, 1987, federal and state law enforcement personnel searched the Kurth ranch and seized marijuana plants, several pounds of harvested marijuana and other marijuana derivatives. The Kurths were subsequently charged with criminal possession and sale of dangerous drugs.

Following an inventory of the drugs seized, Chouteau County Deputy Sheriff Doug Williams filed a "Dangerous Drug Tax Report" with the D.O.R., pursuant to the Montana Dangerous Drug Tax Act ("the Act").[2] Based on that report, the D.O.R. ultimately assessed a tax

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Clay and Cindy Halley. The Kurths were formerly engaged in a mixed grain and livestock operation on their farm in Choteau, County, Montana.

[2] The Act provides "a tax on the possession and storage of dangerous drugs," and imposes liability for the tax on "each person possessing or storing dangerous drugs." Mont.Code Ann. § 15-25-111(1). Section 1525-113(1) of the Act further provides:

> All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department [D.O.R.], together with such other information which the department may require, in a manner and on a form prescribed by the department.

on the Kurths, including penalties and interest, of $750,096.68.

The Kurths filed a timely administrative challenge regarding the tax, which was suspended, pending resolution of the outstanding criminal charges.[3] Thereafter, the D.O.R. appointed a hearings examiner and the parties began discovery.

On September 9, 1988, the Kurths filed a voluntary petition in bankruptcy under Chapter 11, Tile 11, United States Code, thereby automatically staying, pursuant to 11 U.S.C. § 362(a), the administrative proceedings before the D.O.R. On November 14, 1988, the D.O.R. filed a proof of claim in the bankruptcy court in the amount of $908,078.14. The D.O.R. also moved for relief from the automatic stay, which the bankruptcy court denied.

On February 13, 1989, the D.O.R. filed an amended proof of claim for $864,940.99. In response, the Kurths filed a "Combined Objection to Proof of Claim and Complaint to Determine Dischargability [sic] of Indebtedness and for Declaratory and Injunctive Relief." The Kurth's complaint asserted, *inter alia*, several challenges to the Act and the D.O.R.'s amended proof of claim.

Following extensive discovery, the bankruptcy court set the matter for trial on March 27 and 28, 1990. Thereafter, having considered the parties' post-trial briefs, the bankruptcy court, on May 8, 1990, held the disputed tax assessments were arbitrary and capricious and denied the D.O.R.'s amended proof of claim. The bankruptcy court

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[3] On July 18, 1988, after entering guilty pleas, the Kurths were sentenced to various prison terms.

further held that the tax assessments, even if imposed in a procedurally correct manner, violated the fifth amendment's proscription against double jeopardy.

On appeal, the D.O.R. asserts two principal challenges to the bankruptcy court's decision. First, it contends the bankruptcy court lacked subject matter jurisdiction and, therefore, should have lifted the automatic stay or abstained from addressing the constitutional issues. Second, it contends the bankruptcy court erred in holding the subject tax assessments violated the double jeopardy clause.

DISCUSSION

A. Jurisdiction

The D.O.R. asserts the bankruptcy court, as a non-Article III court, lacked the power to adjudicate the constitutionality of the Montana Dangerous Drug Tax Act. The D.O.R. premises its position on the Supreme Court's decision in *Northern Pipeline Construction v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

In *Marathon*, a Chapter 11 debtor filed a breach of contract claim with the bankruptcy court, invoking jurisdiction pursuant to the Bankruptcy Reform Act of 1978 ("1978 Act").[4] The defendant asserted the 1978 Act unconstitutionally conferred Article III judicial power upon judges who lacked life tenure and protection

[4] The Bankruptcy Reform Act of 1978 conferred jurisdiction on the bankruptcy court over all "civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471 (Supp. IV 1976).

against salary diminution. The Supreme Court agreed and, in a plurality opinion, affirmed the dismissal of the debtor's breach of contract claim.

The Supreme Court has subsequently acknowledged the narrow scope of the *Marathon* decision.

> The court's holding in [*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584 (1985). *See also, Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

Congress, in response to the *Marathon* decision, enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), in an effort to cure the jurisdictional deficiencies in the 1978 Act. The BAFJA distinguishes "core" bankruptcy proceedings from those merely "related to" title 11 cases. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 166 (1st Cir. 1987). Upon referral from the district court, the bankruptcy court has full statutory authority to "hear and determine . . . all core proceedings. . . . " *Id., citing*, 28 U.S.C. 157(b)(1).

The determination of a debtor's tax liability constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(B) (Supp. IV 1986), and 11 U.S.C. § 505(a)(1) (1982). *In re Hunt*, 95 B.R. 442, 444 (Bkrtcy. N.D. Tex. 1989). *See also, In re Lipetsky*, 64 B.R. 431, 434 (Bkrtcy. Mont. 1986). As a

threshold matter, 11 U.S.C. § 505 empowers the bankruptcy court to determine a debtor's tax liability provided the merits of the tax claim have not been previously adjudicated in a contested proceeding before a court of competent jurisdiction. *Id., citing,* 28 U.S.C. 505(a)(1).[5] In the present action, it is beyond dispute that the amount and legality of the subject tax assessments were not fixed by final order of an administrative or judicial court prior to the filing of the Kurth's Chapter 11 petition.

The narrow interpretation given the *Marathon* decision, coupled with the history of bankruptcy court jurisdiction over actions like this, and the differences between the present action and *Marathon* with respect to fairness and practicality, convince this court that the bankruptcy court could "hear and determine" the validity of the D.O.R.'s proof of claim. The court recognizes the bankruptcy court retains the power to abstain from deciding a case for reasons of justice, comity with state courts, or

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[5] Section 505(a) allows a review of "any tax." 11 U.S.C. 505(a). As a result, both state and federal tax liabilities may be reviewed, provided that the review complies with the language of § 505(a)(2)(A). *In re Galvano,* 116 B.R. 367, 372 n.6 (Bkrtcy. E.D.N.Y. 1990). Thus, for example, bankruptcy courts have reviewed assessments of state Retailers' Occupation Taxes, *In re Northwest Beverage, Inc.*, 46 B.R. 631 (Bkrtcy. N.D. Ill. 1985), state sales taxes, *In re Tapp*, 16 B.R. 315 (Bkrtcy. Alaska 1981), state real property taxes, *In re Lipetsky,* 64 B.R. 431 (Bkrtcy. Mont. 1986), city ad valorem taxes, *In re Electronic Theatre Restaurants. Inc.*, 85 B.R. 45 (Bkrtcy. N.D. Ohio 1988), federal income taxes, *In re Dolard,* 519 F.2d 282 (9th Cir. 1975), and federal employment taxes, *In re Vermont Fiberglass, Inc.*, 76 B.R. 358 (Bkrtcy. Vt. 1987). *Id.*

respect for state law, 28 U.S.C. § 1334(c)(1), but no such reason applies here. *Cf. In re Franklin Computer Corp.*, 50 B.R. 620, 626 n.8 (Bkrtcy. E.D. Pa. 1985); *In re Pioneer Development Corp.*, 47 B.R. 624, 628 (Bkrtcy. N.D. Ill. 1985).

The D.O.R. also alleges the Bankruptcy Amendments and Federal Judgeship Act of 1984 is unconstitutional in that it purports to confer jurisdiction upon bankruptcy courts that exceeds the limits of Article III. The court is unpersuaded by the D.O.R.'s argument in support of its position.

Therefore, the court concludes the bankruptcy court properly exercised jurisdiction over the present action. The court turns to address the merits of the subject tax assessments.

B. Tax Assessments

The bankruptcy court, in denying the D.O.R.'s proof of claim, held the tax assessments, although a civil penalty, served to punish the Kurths a second time for conduct to which they had plead guilty and been sentenced.[6] As a result, the court, relying on *United States v. Halper,* 490 U.S. 435 (1989), determined the tax assessments violated the double jeopardy clause of the fifth amendment.[7]

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[6] The bankruptcy court also held the tax assessments were arbitrary and capricious with respect to certain items seized and, furthermore, were computed in a manner contrary to the Montana Dangerous Drug Tax Act. This portion of the bankruptcy court's decision is unchallenged on appeal.

[7] The double jeopardy clause protects against three abuses: (1) a second prosecution for the same offense after acquittal; (2)

In *Halper*, the Supreme Court ruled that the double jeopardy clause barred the government from seeking civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-3731, where the defendant had already been sanctioned criminally, and where the penalties sought in the civil proceeding bore no relation to the injury sustained by the government. A unanimous Court stated:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-449.

The Court recognized that in those cases where the purpose of a civil sanction is to compensate the government for its damages and costs, it may be difficult to prove, if not impossible to ascertain, such damages at the point beyond which the sanction takes on the quality of punishment. 490 U.S. at 449. In such cases, the Court recognized that the process of affixing a sanction to compensate the government invariably would involve an element of "rough justice." *Id.* With that in mind, the Court noted:

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational

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a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

> relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449-450.

In the present action, the D.O.R. maintains the Montana Dangerous Drug Tax Act is simply a revenue raising measure, whereby the amount of tax is determined by the type and quantity of the drug possessed. Accordingly, the D.O.R. asserts the Kurths' tax liability is directly related to the amount of marijuana found on their ranch.

The D.O.R. further asserts the Montana Dangerous Drug Tax Act "is designed to recover some of the millions of dollars Montana spends each year because of illicit drugs." The bankruptcy court rejected the D.O.R.'s argument as "mere hyperbole".

> This latter statement of D.O.R. is mere hyperbole, since the D.O.R. failed to introduce one scintilla of evidence as to the cost of the above government programs or costs of law enforcement incurred to combat illegal drug activity. Moreover, Deputy Sheriff Saville was specifically asked by plaintiffs' counsel if the witness had made *any* (even a rough) estimate as to the cost to the State on prosecution of the Kurth criminal investigations, arrest, and conviction and he replied none was made. Consequently, the D.O.R. faced with the Halper issue, which was raised at the motion for summary judgment stage, put forth no effort at the trial stage, when it had an opportunity to do so, to show the tax is

'rationally related to the goal of making the government whole.' *Halper, Id.* at 1903.

Accordingly, the bankruptcy court concluded:

If D.O.R. were allowed to impose this tax, without any showing of some rough approximation of its actual damages and costs which it seeks to recover to make the State whole, I would, as noted in *U.S. v. Hall*, [730 F.Supp. 646 (M.D. Penn. 1990)] at 674, 'be sanctioning the very type of 'clear injustice' which *Halper* prohibits,' for, on such state of this record, the tax is punishing the debtors twice for the same criminal conduct.

Having carefully reviewed the record herein, together with the parties' briefs in support of their respective positions, the court is compelled to conclude the bankruptcy court's order dated May 8, 1990, was not in error. In this court's opinion, the order was well-reasoned and supported by the evidence of record. The D.O.R. has failed to present a persuasive argument to the contrary. As applied to the factual situation presented, the Montana Dangerous Drug Tax Act simply punishes the Kurths a second time for the same criminal conduct. That fact, coupled with the D.O.R.'s failure to provide the Kurths or the bankruptcy court with an accounting of its actual damages or costs, leads to the inescapable conclusion that the subject tax assessments violated the double jeopardy clause of the fifth amendment.

Accordingly, IT IS HEREBY ORDERED that the May 8, 1990, order of the United States Bankruptcy Court for the District of Montana be, and the same hereby is, AFFIRMED.

DATED this 23 day of April, 1991.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES BANKRUPTCY COURT

For the _____ District of MONTANA

IN RE

KURTH RANCH, et al ROBERT DRUMMOND, Trustee; KURTH RANCH, et al Plaintiff v. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA Defendant	)	Case No. 88-40629-11 Adversary Proceeding No. 289/0042

JUDGMENT

[x] This proceeding having come on for trial or hearing before the court, the Honorable John L. Peterson, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

[OR]

[ ] This proceeding having come on for trial before the court and a jury, the Honorable , United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

[OR]

[ ] This issues of this proceeding having been duly considered by the Honorable , United States

Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED: IT IS ORDERED the Plaintiffs' Objections to Amended Proof of Claim filed by the Montana Department of Revenue in the sum of $864,940.99 pursuant to the Montana Dangerous Drug Act, Section 15-25-101-123, Mont. Code Ann. (1987) are granted and the Proof of Claim is denied. IT IS FURTHER ORDERED that all sums recovered by the Defendant from the Plaintiff pursuant to the double jeopardy tax assessment shall be forthwith remitted to the Trustee, Robert G. Drummond.

Bernard F. McCarthy ,
Clerk of Bankruptcy Court

[SEAL]
Copy mailed to attached parties in interest this 8th day of May, 1990.
/s/ Kathy Schelin
Deputy Clerk
[Seal of the U.S. Bankruptcy Court
Date of Issuance:
May 8, 1990

By: Kathy Schelin ,
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; and CLAYTON H. and CINDY K. HALLEY, husband and wife;

Debtors.

Case No. 88-40629

Adversary Proceeding No. 289/0042

ROBERT G. DRUMMOND, Trustee; KURTH RANCH; KURTH-HALLEY CATTLE COMPANY; RICHARD M. and JUDITH M. KURTH; DOUGLAS M. and RHONDA I. KURTH; and CLAYTON H. and CINDY K. HALLEY,

Plaintiffs,

-vs-

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Defendants.

ORDER

At Butte in said District this 8th day of May, 1990.

The Plaintiff/Trustee and Debtors filed a Complaint under Bankruptcy Rule 7001 to contest the tax assessed pre-petition against the Debtors by the Defendant, Montana Department of Revenue (D.O.R.) under the Montana Dangerous Drug Tax Act, Section 15-25101, et seq., Mont. Code Ann. (1987). The Complaint states thirteen different counts for relief, all of which are denied by the D.O.R. Following answer and discovery, each party sought summary judgment under Bankruptcy Rule 7056, which motions were denied in toto by the Court. The case proceeded to trial on March 27 and 28, 1990. Briefs have been filed by the respective parties and the matter is ripe for decision.

The parties concede this Court has jurisdiction to try and decide this matter under 28 U.S.C. Section 1334 and 11 U.S.C. Section 505, because the tax claim has not been contested by the Debtors and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the filing of the Chapter 11 case. *In re Lipetsky*, 64 B.R. 431 (Bankr. Mont. 1986); *Quattrone Accountants, Inc. v. I.R.S.*, 895 F.2d 921 (3rd Cir. 1990). *Lipetsky* states:

> "The determination of a debtor's tax liability is a core proceeding under Section 157 of the Code, and this Court thus has jurisdiction [under Section 505] to determine the amount and legality of the tax, except where said tax has been fixed by final order of an administrative or

judicial tribunal, after being reasonably contested by the taxpayers." *Id.* at 434.

The final Pre-Trial Order signed in this adversary proceeding sets forth Agreed Facts as follows in paragraphs 1 - 27, to-wit:

1. The Plaintiff, Richard M. Kurth, is a former rancher/farmer who, along with the other Plaintiffs in this action, engaged in a mixed grain and livestock operation on their Choteau County, Montana, farm.

2. The Plaintiff, Judith M. Kurth, is the wife of Richard M. Kurth. Mrs. Kurth assisted her husband and the other Plaintiffs in the operation of the Plaintiffs' ranch and farm.

3. The Plaintiff, Douglas M. Kurth, is the son of Richard and Judith Kurth and participated in the farm and ranch operations conducted on the Plaintiffs' Choteau County, Montana, ranch and farm.

4. The Plaintiff, Rhonda I. Kurth, is the wife of Douglas M. Kurth and participated in the farm and ranch operations conducted on the Plaintiffs' Choteau County, Montana, ranch and farm.

5. The Plaintiff, Clayton H. Halley, is the son-in-law of Richard and Judith Kurth and participated in the Plaintiffs' farm and ranch operations in Choteau County, Montana.

6. The Plaintiff, Cindy K. Halley, is the wife of Clayton Halley and daughter of Richard and Judith Kurth. Mrs. Halley assisted in the farm and ranching activities conducted on the Plaintiffs' ranch and farm.

7. The Kurth-Halley Cattle Company was a family partnership engaged in the business of raising and selling livestock. The partners in the Kurth-Halley Cattle Company were Doug and Rhonda Kurth and Clayton and Cindy Halley.

8. The Plaintiff, Kurth Ranch, was the name for the general farm and ranch operations conducted by the above-named Plaintiffs on their Choteau County ranch and farm.

9. The Plaintiff, Robert G. Drummond, is the Trustee of the bankruptcy estate.

10. The Defendant, State of Montana, Department of Revenue, is an executive branch agency created by MCA § 2-15-1301.

11. The Plaintiffs (Richard and Judith Kurth, Clay and Cindy Halley, and Doug and Rhonda Kurth) were formerly engaged in a mixed grain and livestock operation on their Choteau County, Montana, farm.

12. After suffering for several years from draught and low market prices, the Plaintiffs incurred large debts and faced the prospect of losing their family farm.

13. The Plaintiffs, in December, 1985 or January, 1986, began growing and selling marijuana.

14. The Plaintiffs' marijuana operation continued until October 18, 1987, when state and federal law enforcement personnel raided the Plaintiffs' farm.

15. On October 18, 1987, the State of Montana seized the following alleged items from the Plaintiffs:

"Item #1: 2155 marijuana plants in various stages of growth,

Item #2: 7 gallons of hash oil,

Item #3: 4 bags of marijuana at two pounds each,

Item #4: 65/one gram vials of hash tar,

Item #5: 14 baby food size jars of hash tar,

Item #6: 7 pint jars of hash tar,

Item #7: 1 bag of marijuana, 1/4 pound,

Item #8: 5 plastic bags of marijuana; total 2230 grams,

Item #9: approximately 100 pounds of marijuana stems, leaves, parts, etc."

16. The Plaintiffs were subsequently charged by Information with criminal possession and sale of dangerous drugs.

17. On July 18, 1988, after the Plaintiffs entered guilty pleas, the Honorable District Court Judge Chan Ettien of the Montana Twelfth Judicial District, Choteau County, sentenced the Plaintiffs to the following prison terms:

a. *Richard M. Kurth: Count I*: The Defendant is sentenced to a term of twenty (20) years in the Montana State Prison with the last fifteen (15) years suspended for the commission of the offense of criminal sale of dangerous drugs, marijuana, in violation of Montana law Section 45-9-101, MCA; *Count II*: The Defendant is sentenced to a term of twenty (20) years in the Montana State

Prison with the last fifteen (15) years suspended for the commission of the offense of criminal possession of a dangerous drug, marijuana, with intent to sell in violation of Montana law, Section 45-9-103, MCA; *Count III*: The Defendant is sentenced to a term of twenty (20) years in the Montana State Prison with the last fifteen (15) suspended for the commission of the offense of solicitation to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, in violation of Section 45-4-101, MCA; and *Count IV*: The Defendant is sentenced to a term of five years in the Montana State Prison for the commission of the offense of criminal possession of a dangerous drug, hashish, in violation of Montana law Section 45-9-102, MCA.

b. *Judith M. Kurth*: The Defendant . . . is hereby sentenced to a term of five (5) years in the Women's Correctional Center in Warm Springs, Montana, or such other authorized place, with the last four (4) years suspended for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

c. *Douglas Kurth*: The Defendant . . . is hereby sentenced to a term of twenty (20) years in the Montana State Prison, Deer Lodge, Montana, with all twenty (20) years suspended for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with

intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

d. *Rhonda Kurth*: The imposition of sentence upon the Defendant, Rhonda Kurth, [is] deferred for a period of three (3) years for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

e. *Clay Halley:* The Defendant . . . is hereby sentenced to a term of ten (10) years in the Montana State Prison with all of that time suspended for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

f. *Cindy Halley*: The imposition of sentence upon the Defendant, Cindy Halley, [is] deferred for three (3) years for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA.

18. MCA § 15-25-111(1) provides "a tax on the possession and storage of dangerous drugs," and imposes liability for the "tax" on "each person possessing or storing dangerous drugs."

19. MCA § 15-25-111(2) provides that the amount of the "tax" due is the greater of the following:

(a) 10% of the assessed market value of the drugs, as determined by the department; or

(b)(i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per ounce of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

20. The Defendant initially assessed a Jeopardy Assessment Tax on marijuana and hash tar in the amount of $445,152.25, plus a ten percent (10%) penalty and one

percent (1%) interest, for a total due on December 8, 1987, of $491,776.20.

21. Included within this initial assessment was a tax in the amount of $213,345.00 against 2,155 growing marijuana plants.

22. The Montana Controlled Substances Act, provisions of which are incorporated by reference into MCA § 15-25-111(2), fails to provide a definition of "hash tar."

23. Defendant subsequently revised the assessment, adding a claim for 896 ounces of hash oil at $250.00 per ounce, plus penalty and interest, resulting in a Revised Jeopardy Assessment on May 7, 1988, of $750,096.68.

24. The Montana Controlled Substances Act, provisions of which are incorporated by reference into MCA § 15-25-111(2), fails to provide a definition of "hash oil."

25. Pursuant to the Jeopardy Assessment and Revised Jeopardy Assessment, Defendant has levied upon and seized property and accounts of the Plaintiffs totalling $30,680.01. The assessment is subject to a Judgment and Order of Forfeiture entered by the Honorable District Judge, Chan Ettien of the Montana Twelfth Judicial District Court, Choteau County, in Cause No. DV-87-093.

26. The Defendant initially caused to be filed with this Court in *In re Kurth Ranch; Kurth-Halley Cattle Company; Richard M. Kurth and Judith Kurth (H&W); Douglas M. and Rhonda I. Kurth (H&W); and Clayton H. and Cindy K. Halley (H&W), Debtors,* Case No. 88-40629, a Proof of Claim for "tax" liabilities in the [sic] of $908,078.14.

27. Thereafter, the Defendant, Montana Department of Revenue has caused to be filed herein an Amended Proof of Claim for "tax" liabilities under 11 U.S.C. § 507(a)(7)(A), (C) and (E) in the sum of $864,940.99, consisting of $684,914.30 in principal, $113,134.44 in penalties and $66,914.30 in interest itemized as follows:

1987 (sic) Montana Dangerous Drug Tax:	$669,152.25
Penalty:	$111,634.44
12% Interest 12/8/87-9/8/88:	$ 66,914.30
TOTAL:	$847,690.99
	(sic)

1987 (sic) Montana Dangerous Drug Tax:	$ 15,750.00
Penalty:	$ 1,500.00
12% Interest 12/8/87-9/8/88	$ 0
TOTAL:	$ 17,250.00

The Montana Dangerous Drug Tax Act went into effect on October 1, 1987, about 17 days before the confiscation of the marijuana and related paraphernalia by the Choteau County Sheriff's Office, and U.S. Drug Enforcement Administration (D.E.A.). Regulations dealing with the tax law were not promulgated by the D.O.R. until November 13, 1987. Mont. Admin. R. (ARM.) § 42.34.101 et seq. (1987).

The evidence shows the Plaintiff/Debtors first attempted to grow marijuana from seeds, but such attempts failed to produce any quantity of merchantable crop. Debtors then purchased 86 marijuana plants for $2,500.00, which plants died, and they were then supplied 80 additional plants in the summer of 1986, when Debtors commenced their growing operation inside buildings and

trailers located on the family ranch. The business expanded to the largest marijuana growing operation in the State of Montana when shut down by law enforcement authorities in October, 1987. According to Richard Kurth, each marijuana plant, when fully matured and ready to harvest, produced .65 ounces of marijuana buds, which he sold for about $73.15 per bud. Initially, each plant was destroyed after one harvest, but toward the end of the operation, Debtors began boiling the stems and leaves of the remaining plant (called "shake") in alcohol in an attempt to manufacture marijuana oil or "hash oil." "Shake" is a derivative of the marijuana plant which has less street value because it contains lower tetrahydrocannabinol (THC), the chemical substance in the marijuana bud which activates a user's senses.

The Debtors' operation was closed on October 18, 1987, when law enforcement officers arrested the Debtors and confiscated all plants, materials and paraphernalia on the premises. Under the Montana Drug Tax Act, the arresting officer is obligated to send to the D.O.R., on a form prepared by the D.O.R., a Drug Tax Report listing each item seized. It is noteworthy in this case that the report sent by the Choteau County Sheriff was the first report sent to the D.O.R. because the law became effective just shortly before the drug operation was shut down. Moreover, the arresting officers were provided absolutely no instructions on the form or by other separate instructions from the D.O.R. as to how the report was to be prepared and filed. It is obvious from the evidence in this case that the law enforcement personnel were primarily concerned, as they rightly should have been, with the criminal aspects of the case than with the newly

exacted Drug Tax Act. Accordingly, Douglas Williams, Deputy Sheriff, prepared and filed with the D.O.R. under date of November 16, 1987, the Drug Tax Report which listed the following items, to-wit:

> "Item #1: 2155 marijuana plants in various stages of growth,
>
> Item #2: 7 gallons of hash oil, (lined out),
>
> Item #3: 4 bags of marijuana at two pounds each,
>
> Item #4: 65/one gram vials of hash tar,
>
> Item #5: 14 baby food size jars of hash tar,
>
> Item #6: 7 pint jars of hash tar,
>
> Item #7: 1 bag of marijuana, 1/4 pound,
>
> Item #8: 5 plastic bags of marijuana; total 2230 grams,
>
> Item #9: approximately 100 pounds of marijuana stems, leaves, parts, etc."

Item #2 on the report was lined out because the substance had not undergone chemical analysis by the Montana Division of Forensic Science. The first report contained no monetary value of each item. Thereafter, on November 18, 1987, Deputy Sheriff Williams sent a letter to the Choteau County Attorney regarding the Dangerous Drug Tax Report stating he had requested a dollar amount from D.E.A. to send to the D.O.R. In the November 18, letter, Williams set forth values of each item as follows:

> "Item #1: Marijuana plants valued at $1,500.00,
>
> Item #2: Hash oil - no value set

Item #3: 8 pounds of marijuana at $16,000.00,

Item #4: Vials of hash tar, $10/gram $650.00

Item #5: Baby food size jars hash tar figured at 8 oz.,

Item #6: Pint jars of hash tar @$700.00/oz.,

Item #7: Marijuana @$2,000.00/lb. Item #8: 2230 grams of marijuana @$2,000.00/lb.,

Item #9: approximately 100 pounds of shake at $200.00/lb."

Following such report, on December 1, 1987, Williams sent a letter to Robert S. McGee, head of the Miscellaneous Tax Division of D.O.R., stating that the tax report was previously forwarded on the Kurth operation, and the values of Items 1-9 above set forth in the November 18, letter were repeated in the December 1, letter. Williams stated the values were obtained from the Drug Enforcement (D.E.A.) agent in Great Falls and "the prices are very defensible by the D.E.A. and by the Montana Department of Justice/Criminal Investigation Bureau." Williams advised that if D.O.R. wished to value the hash oil, it should await doing so until the forensic laboratory had an opportunity to test the samples' quality and quantity. On November 20, 1987, Williams sent to the forensic laboratory for testing 23 separate samples of materials, including samples of hash oil, hash tar, fifty-six random samples of leaves taken from the 2155 plants (randomly selected), random samples from ten plastic bags of marijuana and samples from the box of shake. Without waiting for the lab report, which was issued on December 30, 1987, McGee proceeded to issue the tax assessment,

excluding hash oil, on December 7, 1987. McGee conceded at trial he was not an expert on valuation of illegal drugs, and this was the first assessment made under the Drug Tax Act. He called some individuals associated with the D.E.A. in San Francisco about values, but cannot remember the substance of any conversation. He made no contact with the D.E.A. agent in Great Falls, who Williams had reported to have valued the lot. The only documentation of the assessment is the reports from Choteau County and the assessment notice. In making the plant assessment he stated he relied on the value fixed by the Choteau County sheriff's officer, who had reported that the plants were in various states of growth. It is noteworthy that none of the plants were weighed, McGee had no knowledge of the various plant sizes because he did not personally inspect the operation (and never has), he had no information as to budding contents, and his assessment was based on "in-house" discussions with the D.O.R. legal and administrative staff. At trial, McGee was extremely vague as to the substance of any conversation or the results of his cursory investigation as to value.

The December 7, 1987, Statement of Tax Computation, (Exhibit 18) sent to each Debtor individually, calculated the tax as follows:

"Tax on possession and storage of dangerous drugs is the greater of, 10% of assessed market value or dollar amount per weight; 15-25-111, MCA.

2155 Marijuana plants, 10 states of growth value reduced 10% each stage

Plants	Value Per Plant	Total Value	10% Market Value Tax
215.5	$1,800.00	$387,900.00	$38,790.00
215.5	$1,620.00	$349,110.00	$34,911.00
215.5	$1,440.00	$310,320.00	$31,032.00
215.5	$1,260.00	$271,530.00	$27,153.00
215.5	$1,080.00	$232,740.00	$23,274.00
215.5	$ 900.00	$193,950.00	$19,395.00
215.5	$ 720.00	$155,160.00	$15,516.00
215.5	$ 540.00	$116,370.00	$11,637.00
215.5	$ 360.00	$ 77,580.00	$ 7,758.00
215.5	$ 180.00	$ 38,790.00	$ 3,879.00
		Tax on Marijuana Plants	$213,345.00

Other dangerous drugs

Amount	Tax per ounce	Tax
1811 oz. Marijuana	$100.00	$181,100.00
118 oz. Hash Tar	$250.00	$ 29,500.00
	Tax on other drugs	$210,600.00
	Total Tax	$423,945.00
	5% Admin. Fee	21,197.25
	10% Penalty	42,394.50
	1% Interest	4,239.45
	Total Due	$491,776.20"

McGee did not initially value for tax purposes the seven gallons of hash oil because he had no basis on which to fix a value. That item was tested by the forensic laboratory which issued its report on December 31, 1987, stating in part:

> "There is no definition of 'hash oil' in the Montana Controlled Substances Act – or weight ascribed distinguishing felony possession from misdemeanor possession. Because hash oil contains tetrahydrocannabinol (THC), a Schedule I controlled substance, possession of any amount constitutes a felony. Therefore, I did not dry down the hash oil samples to obtain accurate weights since weights are irrelevant. These liquid samples contain varying amounts of volatile solvents which would be represented in a sample weight."

On May 6, 1988, McGee, without requesting the forensic laboratory dry down the oil sample for weight to be assessed under the Drug Tax Act, revised the tax assessment to include a claim for what he termed "Hash Oil," but which was assessed as hashish. He fixed the tax based on 896 ounces of hash oil at $250.00 per ounce for a principal tax of $224,000.00, $22,400.00 for penalty, interest at $15,680.00, for a total additional tax of $262,080.00. Thus, the total tax assessed was $750,096.68. Interest accruing to the date of the Debtors' petition, together with credit for about $30,000.00 collected in state court proceedings, brings a total tax due of $864,940.99.

Whether applying federal or state law, the test of whether the tax is excessive, or arbitrary and capricious, is the same. *Corcoron v. State Board of Equalization*, 154 P.2d 795, 797, holds:

> "It is well settled that the courts will not substitute their judgment for that of the taxing officials in fixing the value of property for tax purposes. *Danforth v. Livingston*, 23 Mont. 558, 59 P.916; *Johnson v. Johnson*, 92 Mont. 512, 15 P.2d 842. The courts will intercede however when it

> appears that the valuation fixed by the taxing officials is so grossly excessive as to amount to arbitrary action or to be inconsistent with the exercise of an honest judgment. *International Business Machine Corporation v. Lewis and Clark County*, 111 Mont. 384, 112 P.2d 477; *Investors Security Co. v. Moore*, 113 Mont. 400, 127 P.2d 225. For purposes of taxation the terms 'value' and 'full cash value' mean the amount at which property would be taken in payment of a just debt due from a solvent debtor. Ch. 99, Laws 1939."

Corcoron involved a factual setting where city lots were valued by the County Assessor at about 10 times their value. The court found the assessment excessive, and therefore arbitrary.

In *Pizzarello v. United States*, 408 F.2d 579, (2nd Cir. 1969), a case involving an illegal gambling operation, a jeopardy assessment under 26 U.S.C. § 6862(a) was made by the Internal Revenue Service. *Pizzarello* held:

> "We begin with the assumption that a tax assessment is presumptively valid and that the burden is on the taxpayer to prove its invalidity. *Helvering v. Taylor*, 293 U.S. 507, 55 S.Ct. 287, 79 L.Ed. 623 (1935); *Commissioner of Internal Revenue v. Hansen*, 360 U.S. 446, 79 S.Ct. 1270, 3 L.Ed.2d 1360 (1959). Such a presumption is not evidence itself and disappears upon the introduction of evidence to overcome it. *Compton v. United States*, 334 F.2d 212 (4th Cir. 1964); *New York Life Insurance Co. v. Gamer*, 303 U.S. 161, 58 S.Ct. 500, 82 L.Ed. 726 (1938); *Kentucky Trust Co. v. Glenn*, 217 F.2d 462 (6th Cir. 1954)."
>
> *Id.* at 583.

Both cases stand for the time honored proposition that if the tax is excessive, it is arbitrary and capricious, and must be set aside.

McGee's assessment of valuation for several items was arbitrary in that it lacked any basis in fact. As noted above, McGee assessed the plants in various stages of growth by simply dividing the 2155 plants into 10 categories, and then depreciating each category by 10% from a beginning value of $1,800.00 per plant. Yet Williams, ostensibly based on D.E.A. reports, valued the plants at $1,500.00 each. Keith Aller, D.E.A. Administrator for Montana, testified he was never consulted by McGee, and he participated in valuation of the plants at the $1,500.00 figure reported by Williams. But that value, according to Aller, was fixed based on a producing marijuana plant with 2 pounds of bud from a 12 foot plant. None of the plants seized which were in full growth were over 2 to 3 feet in height and no weight of bud was taken from any plant, even though the means to do so was available. Aller then conceded "there is no market for growing plants" from his experience. His value thus came from extrapolation of the value of the bud produced vis-a-vis the value of "street" or retail marijuana. He confessed a plant which was of the size found at the Kurth Ranch could not produce 2 pounds of marijuana. Such is consistent with the testimony of Richard Kurth, who was not questioned by McGee prior to the assessment, that the fully grown pygmy plants produced about .65 ounces per plant. Thus, the value of the plants was materially overvalued.

In addition, the breakdown by McGee into 10 categories is completely arbitrary. According to the best of the

testimony, over 1300 of the plants were mere cuttings as shown by the photographs taken by the Sheriff's Department on the day of the arrest. Based on the evidence, coupled with a failure of D.O.R. to instruct the Sheriff's Department to weigh the marijuana bud on each plant, which it is conceded could have been readily accomplished, the fixing of any value on the plants simply lack credible basis. Indeed, when answers to written interrogatories were made by the sheriff's office personnel, on behalf of the D.O.R., it developed that the plants in various stages of growth depended on the number of growing hours of each lot, which ranged from 18 to 12 hours. According to the verified answers, 1313 plants were located in 18 hour growing rooms and 918 located in 12 hour growing rooms. Deputy Sheriff Saville testified that the 1313 plants were mere cuttings placed in 4" by 4" boxes. From all the evidence, it is clear the cuttings are of no value. It is important to remember that under D.O.R. regulations "market value" is fixed at the time of confiscation of the drug. Mont. Admin. R. 42.34.101(2) (ARM). If the plant contains no THC substance on that date, no tax can be established for there is no dangerous drug. Thus, it is imperative the plants be dried, weighed, and chemically tested for THC to establish the tax. Weight is also a criteria under the Drug Tax Act. Such was not accomplished in this case. It is also clear that McGee did not have such information available, nor did he request such data, when he issued the tax assessment. Nor has the D.O.R. changed the assessment when such evidence was produced upon discovery. In sum, as to the plant valuation, D.O.R. has steadfastly clung to the totally inappropriate assessment method made by McGee on

December 7, 1987, being within one week of the day he received only a plant count from the sheriff's office. From this record, there is absolutely no basis, other than by speculation, to fix a tax on the plants because the best evidence is that the plants themselves either have no retail value, or the total chemical substance and weight was not developed by appropriate means available to the D.O.R.

The other two categories which also fit into the same class of arbitrary assessment are those dealing with hash oil and hash tar. Aside from McGee's lack of knowledge and experience, it now appears plain from the record that after further examination some of the vials of hash tar reported to the D.O.R. on December 1, 1987, were in fact empty. This fact was discovered between the date of November 18 and December 1, 1987, but was never reported to McGee by Williams. It resulted in the sheriff's department lowering its estimate of market value of the cache by over $100,000.00. Neither did McGee ever view the vials himself in making the assessment. A tax of $29,500 based on 118 ounces of so-called hash tar is clearly arbitrary and capricious when the 118 ounces does not in fact exist. Therefore, there is simply no way to compute the present value of 118 ounces of hash tar from the information supplied to the D.O.R. by the Sheriff's Office.

When Officer Williams initially reported the matter to D.O.R. on November 16, 1987, he struck out the quantity under Item 2 of "Seven gallons of hash oil." The report of December 1, which formed the basis of the assessment, reports no quantity under Item 2 and no value. The tax assessment made May 6, 1988, is based on

896 ounces of hash oil. Taking judicial notice that one gallon equals 128 ounces, it is obvious McGee used the seven gallon figure which was stricken from the report by the sheriff's office. It remains a mystery to this date as to the true quantity of alleged hash oil. This issue is more exacerbated when one considers that some of the samples taken from the gallon jugs (reported as 10 to the forensic laboratory) show no evidence of THC. Under the D.O.R. theory, such lack of chemical substance disqualifies the liquid as a controlled substance. Moreover, the record in this case conclusively shows that McGee never had any information provided to him from any source as to the market value of the hash oil. Indeed, no such evidence exists in the record. McGee failed to follow the statutory duty required of him under the Drug Tax Act, namely, to fix the tax based on the greater of a comparison between 10% of market value as opposed to a flat statutory rate. Clearly, McGee's action in failing to follow a statutory directive is arbitrary. It is noteworthy McGee recognized such legal duty because he fixed the tax on marijuana after comparing market value and the flat rate and took the greater number.

Finally, the Dangerous Drug Tax statute, in provisions pertinent to this case, provides for the taxation of hashish as defined in 50-32-101. The terms hash oil or hash tar are not defined in either code section. The D.O.R. taxed the hash tar and hash oil as hashish. It could be argued that under § 15-25111(2)(b)(iv), a tax of $100.00 per ounce may be levied on any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in subsection (2). A substance containing THC may fit into this subparagraph but the

D.O.R. did not apply such provision, and it is now bound by its tax approach. Section 50-32-101(14) defines hashish "as distinguished from marijuana, means the mechanically processed or extracted plant material that contains tetrahydrocannabinol (THC) and is composed of resin from the cannabis plant." Hashish is an extraction of the active ingredients of marijuana plants. *See, State v. Randall*, 540 S.W. 2d 156, 158 (Mo. 1976). The chemists from the forensic laboratory correctly stated that hash oil, a liquid substance, is undefined in the Montana law. Such is true of hash tar. However, the means used by Kurth to extract the THC substance from the marijuana plant by boiling in alcohol does fit into the hashish definition of mechanically extracting plant material that contains THC and is composed of resin. *Webster's Dictionary* (Third International 1961) defines resin as a preparation consisting chiefly as a drug extracted by solvency (as by alcohol). Consequently such substance, if properly valued or fairly reported in weight or content, could have been taxed as hashish under the Montana Dangerous Drug Tax Act. In effort to avoid Plaintiffs' contrary argument, the D.O.R. claims the Plaintiffs are estopped from asserting the liquid substances seized were not hashish as taxed, because Richard Kurth pleaded guilty under plea bargaining to possession of hashish. It is noteworthy that the Trustee is also a party Plaintiff to this action, acting on behalf of the unsecured creditors. Obviously, the Trustee is not estopped to contest the claim. Further, all other Debtors as criminal Defendants pleaded guilty to possession of marijuana, not hashish. Moreover, the better reasoned legal authorities recognize a distinction in applying the doctrine of collateral estoppel in cases based

upon trial and conviction as opposed to pleas of guilty. *Northwestern Nat. Casualty Co. v. Phalen*, 182 Mont. 448, 597 P.2d 720, 727 (1979) states:

> "Phalen's plea of guilty to felony assault is not conclusive either as to his policy coverage or the duty of Northwestern to defend him in a tort action. *Teitelbaum Furs, Inc. v. Dominion Insurance Company (1962)*, 38 Cal. 2d 601, 25 Cal. Rptr. 559, 375 P.2d 439, 441; *Brahawn v. Transamerica Insurance Company* (Md. 1975), 276 Ma. 396, 347 A.2d 842, 848."

Teitelbaum Furs, Inc., relied upon by the Montana Supreme Court, states the reasoning for such rule.

> "A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admission. It would not serve the policy underlying collateral estoppel, however, to make such a plea conclusive. 'The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy.' (Bernhard v. Bank of America, 19 Ca1.2d 807, 811, 122 P.2d 892, 894.) 'This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case.' (*Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 18, 193 P.2d 728, 732.) When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice (see, *Vaughn v.*

> *Jonas*, 31 Ca1.2d 586, 594, 191 P.2d 432) combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." *Id.* at 441.

From the above authorities, the guilty plea of Richard Kurth is not binding on him, the Trustee or the other Plaintiffs. All of the Plaintiffs have the right to litigate in this civil proceeding whether hash tar or hash oil can be taxed as hashish under the Dangerous Drug Tax Act,[1] and if so by what criteria. In fact, that issue was never raised in the criminal proceedings.

The next item taxed by the D.O.R. was 100 pounds of shake at $100.00 per ounce for a total tax of $160,000.00 plus penalty, administrative fee and interest. The deputy sheriff's Drug Tax Report valued the shake at $200.00 per pound market value. At the outset, it becomes obvious that the tax assessed on this substance is 8 times its market value. McGee testified that in his 20 years of experience he has never levied a tax on property which is

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[1] D.O.R. acknowledges that hash oil is defined under federal law both by the D.E.A. and under the federal criminal sentencing guidelines. 18 U.S.C. Appdx. ch.2, § 201.1 (1989). As a result, there is a definition in existence which could be adopted by the Montana legislature. *See, U.S. v. McMahan*, 673 F.Supp. 8 (D. Me. 1987) for a description of the Federal Controlled Substances Act, 21 U.S.C. 812. As stated in *U.S. v. Walton*, 514 F.2d 201, 203 (D.C. Cir. 1975) and *U.S. v. Kelly*, 527 F.2d 961 (9th Cir. 1976), the Federal Controlled Substances Act of 1970 defines marijuana to include those parts of marijuana which contain THC and excludes those parts which do not. The Montana statute by contrast differentiates between marijuana and hashish and fails to broadly define marijuana as does the federal act.

8 times the market value. Plaintiff argues that because of such gross disparity to market value, the tax imposed is confiscatory, being therefore penal in nature. The Dangerous Drug Tax Act requires the tax be fixed at the greater of 10% of market value or $100.00 per ounce. Aller testified that shake has a market value in Montana at wholesale of $200.00 per pound and $250.00 to $500.00 per pound at retail. Both deputy sheriffs who participated in the arrests testified there is a market for such substance in Montana and that the shake could be upgraded by a device called a "marygin" which separates the stems and seed from the leaves. Such product would be a derivative of marijuana. Plaintiff's witness, Rosenthal, states the material was not saleable, but I reject Rosenthal's testimony on grounds that Rosenthal is not a credible witness. Rosenthal is a drug culture author who promotes the cultivation of marijuana and other controlled substances through his writings. He testified he never used marijuana, but his writings are replete with a contrary story. His bias and prejudice in favor of drug culture related activities such as Kurth's is obvious for that is how he makes his living. I therefore disregard all of his testimony as I find he is not a credible witness.

The above arguments presented by the Plaintiffs also are raised as to the tax imposed on 211 ounces of marijuana found in plastic bags ready for sale by Kurths. This material was the finished product. While Plaintiffs make some argument that the weighing of each bag should have been done on an individual basis, and chemically tested, I find the deputy sheriff weighed one bag at 1/4 pound and then simply multiplied the rest of the bags to arrive at the 8 pound result. The additional marijuana

cache was weighed at 2230 grams. I conclude such effort was sufficient. The tax imposed by D.O.R. on such material was at $100.00 an ounce, or $1,600.00 per pound, greater than 10% of the market value of the product, which was fixed at $2,000.00 per pound. Again, in making this assessment, McGee followed the proper statutory mandate.

Plaintiffs' constitutional arguments are necessary to address as to the items of shake and marijuana because I find the evidence sufficient as to weight and quality to allow the D.O.R. to tax such items. In other words, the Drug Tax Reports, the laboratory results, and McGee's assessment of the tax on these items was not arbitrary, but was based on credible weight, chemical analysis of the product, and established market value.

Plaintiffs do not dispute that "the unlawfulness of an activity does not prevent its taxation." *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889, 895. The Plaintiffs contend the tax is another fine or penalty which follows arrest and therefore, runs afoul of the double jeopardy and due process clauses of the U.S. Constitution. Plaintiffs rely principally on *U.S. v. Halper*, 490 U.S. ___, 109 S.Ct. 1892, 104 L.Ed. 2d 487 (1989).[2] A number of

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[2] In the Pre-Trial Order, the Plaintiff specifically raised as a contention that the Drug Tax places Plaintiff twice in jeopardy. Under "Law Problems" it is stated, "If the court wishes to analyze this case under *United States v. Halper*, 109 S.Ct. 1892 (1989), a separate factual inquiry will be needed, witnesses will need to be called and evidence presented far differently from that set forth in this order." The evidence should have been presented as the matter was an issue noted in the Pre-trial Order. Neither party prior to or during trial moved to bifurcate

lower court decisions discussing or applying Halper have been cited by both parties. *See, U.S. v. Hall,* 730 F.Supp. 646 (D. N.D. Pa. 1990); *U.S. v. Pani,* 717 F.Supp. 1013 (S.D. N.Y. 1989); *U.S. v. A Parcel of Land with Bldg. L. Thereon,* 884 F.2d 41 (1st Cir. 1989); *U.S. v. Marcus Schloss & Co., Inc.,* 724 F.Supp. 1123 (S.D. N.Y. 1989) (Dicta); *U.S. ex. rel. McCoy v. Med. Review, Inc.,* 723 F.Supp. 1363 (N.D. Cal. 1989); *U.S. v. U.S. Fishing Vessel Maylin,* 725 F.Supp 1222 (S.D. Fla. 1989); *Kvitka v. Board of Registration in Medicine,* ___ N.E. 2d ___, 407 Mass. 140, 1990 Mass. LEXIS 183 (1990); and *Randall Book Corp. v. State,* 558 A.2d 715 (Md. 1989). Some of the federal cases involved forfeiture statutes against real and personal property and distinguish *Halper* on that ground. Other cases are factually inapplicable or contain dicta.

The Double Jeopardy Clause of the Fifth Amendment protects against three abuses; (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). The third of these protections is the one which Plaintiffs claim the D.O.R. has violated by making a substantial tax assessment when Plaintiff/Debtors were convicted of the crime on which the tax is based.

Basically, Plaintiffs argue that the imposition of this penalty, although done pursuant to a "civil" procedure, is in reality a further punishment for the criminal conduct

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the issue and all parties had notice of the contentions as is further discussed in this decision.

to which each Debtor pled guilty. In making its argument, Plaintiffs rely on the recent decision of the United States Supreme Court in *United States v. Halper,* supra.

In *Halper,* the Court considered the question of "whether and under what circumstances a civil penalty may constitute punishment for purposes of the Double Jeopardy Clause." *Id.* at 1901. A unanimous court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1902. The Double Jeopardy Clause, the court went on to hold, prohibits the imposition of such a civil sanction "to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* It is implicated when "the sanction [is] overwhelmingly disproportionate to the damages [defendant] has caused." *Id.*

In determining the purpose behind a civil sanction, the Court must look at more than just the language of the statute itself. As the *Halper* court stated:

> " . . . [W]hile recourse to a statutory language, structure and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not will [sic] suited to the context of the 'humane interest' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual

by the machinery of the state." *Id.* at 1901 (citation omitted).

Thus, the labels of "civil" and "criminal" are not of paramount importance in making this determination. *See, id.* A civil sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment. *Id.* at 1901-1902.

In *Halper,* the Court restated its time-honored recognition of the fact "that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." *Halper,* 109 S.Ct. at 1902. The only proscription established by the Court in *Halper* is that "the Government may not bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Id.* at 1903. It is this second proceeding that triggers the protections of the Double Jeopardy Clause. *See, Id.*, n.10.

D.O.R.'s answer to the double jeopardy argument is that (1) the state has broad latitude in creating tax classifications and drawing lines which, in its judgment produce reasonable systems of taxation, *Kahn v. Sherwin,* 416 U.S. 351 355 (1974); *Regan v. Taxation with Representation,* 461 U.S. 540; (2) that states may tax income from illegal activity even though such income may be forfeited, *James v. U.S.*, 366 U.S. 213 (1961); and (3) the Montana Dangerous Drug Tax Act is not punitive since it does not require a finding of scienter, *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963), but is simply an excise tax designed to partially compensate Montana for costs of rehabilitating drug users. D.O.R. cites the provision of the

Act wherein the tax proceeds are to be used for youth evaluation and chemical abuse aftercare programs, for grants to youth courts to fund assessments and independent juvenile offender facilities, and to fund drug law enforcement and education on a local level. According to D.O.R. "the tax is designed to recover some of the millions of dollars Montana spends each year because of illicit drugs,"[3] so the tax is to cover societal costs, and is therefore not punitive or penal in nature. This latter statement of D.O.R. is mere hyperbole, since the D.O.R. failed to introduce one scintilla of evidence as to cost of the above government programs or costs of law enforcement incurred to combat illegal drug activity. Moreover, Deputy Sheriff Saville was specifically asked by Plaintiffs' counsel if the witness had made *any* (even a rough) estimate as to the cost to the state on prosecution of the Kurth criminal investigations, arrest and conviction and he replied none was made. Consequently, the D.O.R., faced with the *Halper,* issue, which was raised at the Motion for Summary Judgment stage, put forth no effort at the trial stage, when it had an opportunity to do so, to show the tax is "rationally related to the goal of making the government whole." *Halper, Id.* at 1903. I have no doubt such evidence may be available, but it simply was not produced in this case.

It is difficult for this Court to rationalize such neglect of the issue when D.O R. stated in the Brief in Opposition

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[3] Brief of D.O.R. in opposition to Plaintiffs' Motion for Summary Judgment, p.16.

to Plaintiffs' Motion for Summary Judgment (incorporated by reference in its Post-Trial Brief) at page 17 as follows:

> "Even assuming the Drug Tax is subject to analysis under the *Halper* criteria, that case does not permit summary judgment based on the record now before this Court. *Halper* requires a particularized inquiry. As Justice Kennedy stated in his concurring opinion:
>
> > 'Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. (Citations omitted.) Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in nature.'
>
> * * *
>
> In *Halper* the case was remanded back to the District Court for a hearing the damage (sic) suffered by the Government. *Halper* did not exclude an inquiry into the social damages of the taxed activity. There simply is no record for the court to apply the *Halper* criteria to this case."

In denying Plaintiffs' Motion for Summary Judgment, this Court based its denial on the reasoning that numerous factual issues were in dispute or not in the record. Only a

trial could cure those deficiencies. The present record, after trial, is still woefully deficient.

D.O.R. further argues that *United States v. Sanchez*, 340 U.S. 42 (1950) is the case in point as to double jeopardy issue. *Sanchez* challenged a federal tax of $100.00 per ounce or fraction thereof on marijuana assessed under 26 U.S.C. § 2590(a) (2), which statute was later held unconstitutional in *Leary v. United States*, 395 U.S. 6 (1969) on grounds it violated the Fifth Amendment against self-incrimination. *Sanchez* was a tax case, and did involve a criminal action. In deciding the marijuana tax statute was valid, the Court noted that a tax does not cease being valid merely because it regulates, discourages or even definitely deters the activities taxed. *Id.* at 44. *Sanchez* is inappropriately cited by the D.O.R. as decisive of the double jeopardy issue. No such issue was present in *Sanchez*, namely, a multiple-punishment inquiry. *Halper* answers that merely because Congress or a state provides for a civil remedy this,

> " * * * does not foreclose the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 1898.

And since retribution and deterrence are the aims of punishment, and not "legitimate nonpunitive governmental objectives,"

> " * * * , it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving

> either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper,* at 1902.

The tax which I have found to be legally imposed pursuant to Drug Tax Statute on the possession of marijuana exceeds $208,150.00 (without interest). If D.O.R. were allowed to impose this tax, without any showing of some rough approximation of its actual damages and costs which it seeks to recover to make the State whole, I would, as noted in *U.S. v. Hall,* supra, at 674, "be sanctioning the very type of 'clear injustice' which *Halper* prohibits," for, on such state of this record, the tax is punishing the Debtors twice for the same criminal conduct. I find further support for this holding that the tax is penal in nature when one considers, as noted early in this decision, that the tax imposed on the 100 pounds of shake, pursuant to the statute, results in a tax which is 8 times the acknowledged market value of the product.

Moreover, courts have recognized that drug tax statutes, like Montana's, are essentially penal in nature and assist in the enforcement of the state's criminal laws. *See. e.g., State of Kansas v. Durrant,* 769 P.2d 1174, 1181 (Kan. 1989) (" * * * , the state concedes in its brief that the primary purpose of K.S.A. 198 Supp. 79-5021 *et seq.* is to discourage or eliminate drug dealing"). *See also, Tovar v. Jarecki,* 173 F.2d 449 (7th Cir. 1949). Such inquiry is warranted in view of the admonition of the concurring opinion for Justice Kennedy, noted above, in applying the objective tests of *Kennedy v. Mendosa-Martinez,* 372 U.S. 144, 168-169 (1963). The punitive nature of the tax is evident here, because drug tax laws have historically

been regarded as penal in nature, the Montana Act promotes the traditional aims of punishment – retribution and deterrence, the tax applies to behavior which is already a crime, the tax allows for sanctions by restraint of Debtors' property, the tax requires a finding of illegal possession of dangerous drugs and therefore a finding of *scienter,* the tax will promote elimination of illegal drug possession, and the tax appears excessive in relation to the alternate purpose assigned, especially in the absence of any record developed by the State as to societal costs. Finally, the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report. All these aspects of the Drug Tax Act lead to the inescapable conclusion that it has deterrence and punishment as its purpose.

I reject Plaintiffs' alternative constitutional arguments dealing with excessive fines under the Eighth Amendment because the tax is not a fine in a criminal proceeding, *U.S. v. Sanchez,* 340 U.S. 42, 45 (1950), nor does it offend the due process or equal protection clauses in this tax case. *Commonwealth Edison Co. V. [sic] Montana,* 453 U.S. 609, (1980) (due process is not offended if party contesting the tax is afforded an opportunity to challenge the tax before conclusive judgment); *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869 (1985); and *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973) (State may impose different specific taxes upon different trades and professions and vary the rates). All drug dealers are treated equally under the Drug Tax Act, and such is a reasonable classification. Further, there is no unconstitutional delegation of legislative powers to the D.O.R. to

make a determination of market value. *Plum Creek Lumber Co. v. Hutton,* 608 F.2d 1283 (9th Cir. 1979); *Patterson v. Department of Revenue,* 171 Mont. 168, 557 P.2d 798 (1976). I finally reject Plaintiffs' arguments made under Article II, § 28 of the Montana Constitution and eminent domain as spurious.

In conclusion, I find and hold the Jeopardy Tax Assessments issued December 7, 1989, and May 6, 1988, are arbitrary and capricious as to the tax imposed on marijuana plants, hash oil and hash tar, and were made contrary to the provisions of the Drug Tax Act. I further conclude that if the tax on such products were rightfully imposed pursuant to the statute, each assessment, including that assessment for 1811 ounces of marijuana, constitutes double jeopardy to the Debtors, prohibited by the Fifth Amendment to the U.S. Constitution, pursuant to *U.S. v. Halper,* supra.

IT IS ORDERED the Plaintiffs' Objections to the Amended Proof of Claim filed by the Montana Department of Revenue in the sum of $864,940.99 pursuant to the Montana Dangerous Drug Act, Section 15-25-101-123, Mont. Code Ann. (1987) are granted and the Proof of Claim is denied.

IT IS FURTHER ORDERED that all sums recovered by the Defendant from the Plaintiff pursuant to the double jeopardy tax assessment shall be forthwith remitted to the Trustee, Robert G. Drummond.

The Clerk shall enter judgment.

/s/ John L. Peterson
JOHN L. PETERSON
United States Bankruptcy Judge
215 Federal Building
Butte, Montana 59701

Copy mailed to attached
parties in interest this
8th day of May, 1990.

/s/ Kathy Schelin
Deputy Clerk

MERLIN L. SORENSEN,
Plaintiff and Respondent,

v.

THE STATE OF MONTANA,
DEPARTMENT OF REVENUE,
Defendant and Appellant.
THE DEPARTMENT OF REVENUE,
Petitioner and Appellant,

v.

PAUL A. WILLIAMS, JR.,
Respondent and Respondent.

Nos. 91-379 and 91-569.
Submitted May 28, 1992.
Decided July 21, 1992.
Rehearing Denied Aug. 13, 1992.
49 St.Rep. 624.
254 Mont. 61.
836 P.2d 29.

DOUBLE JEOPARDY - TAXATION

1. Double Jeopardy
Double jeopardy clause protects citizens from second prosecution for same offense after acquittal or conviction, and from multiple punishments for same offense. U.S.C.A. Const. Amend. 5.

2. Double Jeopardy
Dangerous drug excise tax did not violate double jeopardy, despite contentions that tax was derived from criminal conviction and served purpose of punishment; tax had remedial purpose, was not intended as criminal sanction, and was not so punitive in purpose or effect that it

constituted criminal penalty. U.S.C.A. Const. Amend. 5; MCA 15-25-101 et seq.

3. Double Jeopardy
Dangerous drug excise tax was not derived from taxpayer's criminal conviction for possession of drugs, and this was not additional criminal penalty in violation of double jeopardy, even though law enforcement officers were required to report names of persons subject to tax; method of reporting tax due did not transform tax into criminal penalty. MCA 15-1-101 et seq., 15-25-101 et seq.; U.S.C.A. Const. Amend. 5.

4. Double Jeopardy
Dangerous drug excise tax did not serve goals of punishment rather than remedial purposes, and thus did not violate double jeopardy under rule that civil sanction may constitute punishment rather than being fixed penalty, amount of tax was based on quantity of drugs in taxpayer's possession. MCA 15-25-101 et seq.; U.S.C.A. Const. Amend. 5.

5. Taxation
State was not required to defend validity of dangerous drug excise tax as nonpunitive by providing summation of costs of prosecution and societal costs of drug use. MCA 15-1-101 et seq.

6. Double Jeopardy
Dangerous drug excise tax of $200 per gram for cocaine and $100 per ounce of marijuana was

not so grossly disproportionate as to transform tax into criminal penalty violating double jeopardy. MCA 15-25-101 et seq.; U.S.C.A. Const. Amend. 5.

7. Double Jeopardy
Dangerous drug excise tax did not on its face violate double jeopardy; excise tax was not criminal penalty, did not serve goals of punishment, and was neither excessive nor grossly disproportionate to harm suffered by government, and reporting procedures did not relate tax to criminal conviction. MCA 15-1-101, et seq., 15-25-113; U.S.C.A. Const. Amend. 5.

Appeal from District Court of Missoula County. Fourth Judicial District. (91-379)
Honorable John S. Henson, Judge.

Appeal from District Court of Lewis and Clark County. First Judicial District (91-569).
Honorable Jeffrey M. Sherlock, Judge.

See C.J.S. Workmen's Compensation § 555(9).

After defendants were convicted of possession of marijuana and cocaine, the Department of Revenue assessed excise tax under Dangerous Drug Tax. The District Courts found the tax violated double jeopardy, and appeals were taken. The Supreme Court, Justice Weber, held that: (1) drug tax was not multiple punishment in violation of double jeopardy, and (2) drug tax was not unconstitutional on it face.

Reversed.

JUSTICE HUNT dissented and filed an opinion in which JUSTICE TRIEWEILER joined.

For Appellant: **R. Bruce McGinnis,** Dept. of Revenue (91-379) and **Paul Van Tricht** argued, Dept. of Revenue (91-569), Helena.

For Respondent: **Clinton H. Kammerer** argued, Kammerer Law Offices, Missoula (91-379) and **Edmund F. Sheehy** argued, Cannon & Sheehy, Helena (91-569).

JUSTICE WEBER delivered the Opinion of the Court.

The Montana State Department of Revenue (DOR) appeals from two separate District Court rulings wherein the courts determined that the tax assessed by the DOR on Merlin L. Sorensen (Sorensen) and Paul A. Williams, Jr. (Williams) violated double jeopardy. We have combined these cases for appeal. We reverse.

The DOR assessed tax on Sorensen's possession of cocaine after the pled guilty to criminal possession of cocaine. In a declaratory action, the Fourth Judicial District Court granted summary judgment in favor of Sorensen finding that Montana's Dangerous Drug Tax, §§ 15-25-101, MCA et seq., is a criminal penalty and violates double jeopardy.

Likewise, after Williams pled guilty to criminal possession of marijuana, the DOR assessed tax on the marijuana Williams had in his possession. The DOR petitioned the First Judicial District Court to determine the constitutionality of Montana's Dangerous Drug Tax. The court found the Drug Tax violated double jeopardy.

The DOR appeals these rulings and raises the following issues for our review:

1. Is Montana's Drug Tax a multiple punishment which violates double jeopardy?

2. Is Montana's Drug Tax Act unconstitutional on its face?

Both Sorensen and Williams pled guilty to possession of dangerous drugs and received sentences and fines under Montana's criminal code. Subsequently, the DOR assessed tax under Montana's Dangerous Drug Tax Act, §§ 15-25-101, MCA et seq. In both cases, the District Court held Montana's Drug Tax violated double jeopardy.

I

Is Montana's Drug Tax a multiple punishment which violates double jeopardy?

[1] The Drug Tax clearly violates double jeopardy if it is a criminal penalty. Double jeopardy protects citizens from a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2089, 23 L.Ed.2d 656.

Next, the Drug Tax may violate double jeopardy if it is an excessive civil sanction. *United States v. Halper* (1989), 490 U.S. 735, 109 S.Ct. 1892, 104 L.Ed.2d 487. In *Halper*, the Court stated that civil as well as criminal sanctions may constitute punishment and violate double jeopardy when the sanction, as applied to the individual, serves the goals of punishment rather then the remedial purposes of compensating the government for its loss.

Halper at 448, 109 S.Ct. at 1901-1902, 104 L.Ed.2d at 501-502.

[2] The DOR contends that double jeopardy does not attach to Montana's Drug Tax because the tax is an excise tax for raising revenue, not a criminal penalty or civil sanction. Appellees contend Montana's Drug Tax is a criminal penalty, and thus, violates double jeopardy.

In *United States v. Ward* (1980), 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742, the Court held that a federal fine imposed for failure to notify officials of an oil spill was a civil sanction, not a criminal penalty, and did not violate double jeopardy. First, the Court determined that Congress intended to establish a civil penalty. Next, using criteria established in *Kennedy v. Mendosa* (1963), 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644, it determined that the penalty was not so punitive in purpose or effect that the civil remedy was transformed into a criminal penalty. The *Kennedy* factors include whether the sanction: involves an affirmative disability or restraint, has historically been regarded as a punishment, requires a finding of scienter, promotes retribution and deterrence, applies to criminal behavior, has an alternate purpose, and is excessive in relation to the alternate purpose. *Kennedy* at 168-169, 83 S.Ct. at 567-568, 9 L.Ed.2d at 661.

The Supreme Court in *Ward* determined that Congress intended to establish a civil penalty. *Ward* at 250-251, 100 S.Ct. at 2642, 65 L.Ed.2d at 750-751. Similarly, here the Montana Legislature clearly intended to create a tax not a criminal sanction. In Chapter 563, Montana Session Laws 1987, the following descriptive paragraphs

precede the wording of the "Dangerous Drug Tax Act" itself:

> WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and
>
> WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and
>
> WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.
>
> THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anti-crime initiatives without burdening law abiding taxpayers.

The intention of the Montana Legislature to enact a revenue producing tax on drugs is clear. Thus, we conclude Montana's Dangerous Drug Tax Act satisfies the first tier of the *Ward* analysis.

Next, we analyze the tax under the *Kennedy* factors to determine whether the tax is so punitive in either purpose or effect as to negate the intention to create a tax. First, the tax does not impose any affirmative disability or restraint upon the taxpayer. The taxpayer is required to pay an assessment based on the quantity of drugs in his possession, and is not subject to incarceration or any other restraint of his liberty or privileges.

Next, the tax has a remedial purpose other than promoting retribution and deterrence. Section 15-25-122, MCA, earmarks the use of the tax funds collected to defray the costs of drug abuse. The tax collected is used for such things as youth evaluations, chemical aftercare, chemical abuse assessments and juvenile detention facilities. The tax collected is based on the quantity of drugs possessed or stored by the taxpayer, and is not excessive in relation to the remedial purposes addressed in § 15-25-122, MCA.

Next, several state courts as well as federal courts have upheld the legitimacy of a tax on the transfer or possession of dangerous drugs. In *United States v. Sanchez* (1950), 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed 47, the Court determined that taxes on illegal activities are not necessarily penal or unconstitutional. "A tax does not cease to be valid merely because it regulates, discourages or deters the activities taxed, even though the revenue raised by the tax is negligibie." *Sanchez* at 44, 71 S.Ct. at 110, 95 L.Ed. 49. Similarly, in *State v. Berberich* (Kan. 1991), 811 P.2d 1192, and *Harris v. State, Department of Revenue* (Fla.App 1. Dist. 1990), 563 So.2d 97, both courts upheld the validity of their state marijuana taxes as legitimate exercises of taxing power, not improper penalties or fines.

Thus, we conclude a tax on dangerous drugs has not been historically regarded as a punishment.

Finally, the tax is based on possession and storage of dangerous drugs. Where possession gives rise to the tax, we conclude that the Act does not involve a finding of scienter.

Respondents argue that the scienter factor is not material where the crime, criminal possession of dangerous drugs under Title 45, MCA, similarly requires no scienter. Respondents claim double jeopardy is violated under the Act because the taxpayer is subject to both a criminal penalty and a tax for the same conduct. We disagree.

In *Helvering v. Mitchell* (1938), 303 U.S. 391, 399, 58 S.Ct. 630, 633, 82 L.Ed. 917, 922, the Court allowed both a civil and criminal penalty for the same act or omission. It held that double jeopardy did not attach to a tax fraud penalty where Congress had created a civil procedure for collecting the penalty and the amount of the penalty was remedial. *Helvering* at 401-404, 58 S.Ct. 634-636, 82 L.Ed. 923-925. Here, as in *Helvering*, the tax is remedial and collected through a separate administrative procedure. Thus, although the conduct of possessing dangerous drugs subjects the taxpayers to both a criminal penalty and a tax, we conclude that it is not so punitive in purpose or effect that it negates the legislative intent to create a civil sanction.

[3] Williams contends Montana's Dangerous Drug Tax is derived from the taxpayer's criminal conviction. Thus, it is a criminal penalty and violates double jeopardy. Williams emphasizes that the tax is not imposed on

persons in legal possession of drugs. Next he points out the tax may be collected as part of the fine imposed in a criminal conviction, or recovered from forfeited property. Finally, unlike other compliance based tax reporting, Title 15, MCA, does not provide for taxpayer compliance prior to arrest. Rather, under § 15-25-113, MCA, law enforcement officers are required to report to the DOR the names of persons subject to the tax. We do not find merit in these contentions.

Here, the assessment of the drug tax does not rest on a criminal conviction. As previously discussed, both civil and criminal penalties may attach to the same act or omission. *Helvering*, 303 U.S. 399, 58 S.Ct. at 633, 82 L.Ed. 922. Further, we do not conclude that the method of reporting the tax due on the possession of dangerous drugs or the method of collecting the amount of tax authorized by statute or administrative rules transforms this tax into a criminal penalty.

We conclude Montana's Dangerous Drug Tax is not derived from a criminal conviction.

[4] Both respondents contend Montana's Dangerous Drug Tax is a criminal penalty. However, in the alternative, if this court finds the tax is not a criminal penalty, they contend it violates double jeopardy under *Halper*. In *Halper* the Court held that a civil sanction violates double jeopardy when it serves the goals of punishment rather than the remedial purposes of compensating the government for its loss. *Halper* 490 U.S. at 448, 109 S.Ct. 1901-1902, 104 L.Ed.2d at 501-502. In that case, Halper, a medical service manager submitted sixty-five inflated claims to medicare demanding a $12 payment on each

claim, when the company was actually entitled to $3 per claim. Halper received a $2000 penalty for each false claim totalling $130,000. The Court concluded that the tremendous disparity between the government's damages of $585 and the civil penalty of $130,000 served the goals of punishment and violated double jeopardy. *Halper*, 490 U.S. at 452, 109 S.Ct. at 1904, 104 L.Ed.2d at 504.

We do not find *Halper* controlling. The court in *Halper* limited its ruling to similar cases. It stated: "What we announce now is a rule for the rare case, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Halper* at 449, 109 S.Ct. at 1902, 104 L.Ed.2d at 502. *Halper* involved a civil sanction and a fixed penalty per offense which was not based on remedial costs. As mentioned, the penalty was $2000 for each event regardless of how small the dollar amount was in terms of cost to the government. In contrast, the Montana Dangerous Drug Tax is an excise tax based on the quantity of drugs in the taxpayer's possession.

[5] We note that both District Courts held the tax was excessive and punitive, not remedial, because the DOR failed to provide a summation of the costs of prosecution and societal costs of drug use. However, unlike the civil sanction in *Halper* where such proof may be required, a tax requires no proof of remedial costs on the part of the state. *Commonwealth Edison Co. v. State of Montana* (1980), 189 Mont. 191, 615 P.2d 847. In *Commonwealth* this Court held that the state is not required to

defend the validity of an excise tax by offering a summation of the costs of governmental benefits. *Commonwealth* 189 Mont. at 207, 615 P.2d at 855-856.

[6] Finally, respondents contend the tax was excessive. Sorensen was assessed a tax of $200 per gram, or $4,216 for his possession of 21.08 grams of cocaine. Similarly, Williams was assessed a tax of $100 per ounce, or $1,260 for his possession of 12.6 ounces of marijuana. We do not conclude that this tax is excessive. It is neither a fixed penalty as in *Halper*, nor is the amount of tax so grossly disproportionate as to transform this tax into a criminal penalty which violates double jeopardy. We also note that the foregoing rates of tax on various drugs are comparable to those in other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act which has now been repealed.

We hold that Montana's Dangerous Drug Tax is not a multiple punishment and does not violate double jeopardy.

II

Is Montana's Drug Tax Act unconstitutional on its face?

[7] The court in Williams held that Montana's Dangerous Drug Tax Act, on its face, violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. We disagree. As stated previously, the tax is not a criminal penalty and does not rest on a criminal conviction. Further, under the *Halper* analysis

the tax does not serve the goals of punishment. Neither is the tax excessive or grossly disproportionate to the harm suffered by the government. Finally, the reporting procedures outlined in § 15-25-113, MCA, do not relate the tax to a criminal conviction. Rather, they protect the taxpayer's Fifth Amendment right against self-incrimination.

We hold Montana's Dangerous Drug Tax Act is constitutional on its face.

Reversed.

CHIEF JUSTICE TURNAGE, JUSTICES HARRISON, McDONOUGH and GRAY concur.

JUSTICE HUNT dissenting.

I dissent. Once again the majority uses the club of the "drug crisis" to crack the shield of the Bill of Rights. Montana's Drug Tax Act clearly violates a constitutional right against double jeopardy through the use of multiple punishments.

As the United States Supreme Court stated in *Halper*, the labels of "criminal" and "civil" are not of "paramount importance." *United States v. Halper* (1989), 490 U.S. 438, 447, 109 S. Ct. 1892, 1901, 104 L. Ed. 2d 487, 501. To determine whether a civil penalty amounts to a criminal penalty "requires a particular assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Halper*, 490 U.S. at 448.

In *Halper*, the United States Supreme Court held that:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to any additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution.

Halper, 490 U.S. at 448-49. Both Williams and Sorensen were previously convicted and punished before the DOR assessed the tax. Clearly, the facts of this case fit the mandate of *Halper* because the Montana Drug Tax is a civil sanction which violates double jeopardy by serving the goals of punishment rather than the remedial purpose of compensating the government for its loss.

Not only does the tax serve the goals of punishment, it fails to bear any rational relationship to the goal of restoring to the State its losses incurred when enforcing its drug laws, particularly when considering the excessive criminal fines imposed by § 45-9-101 through -127, MCA. In addition, the DOR failed to provide any evidence which would establish the societal cost of prosecuting these cases. Indeed, the majority bestows upon the DOR an unfettered license to impose an arbitrary, unequal, and unfair tax.

Although there is evidence that the legislature intended to create a civil penalty, the purpose and effect of the statute is still punishment and deterrence. The Montana Drug Tax Act has previously been litigated in the federal system. As United States Bankruptcy Court Judge for the District of Montana, John L. Peterson, ruled:

> The punitive nature of the tax is evident here, because drug tax laws have historically been regarded as penal in nature, the Montana Act promotes the traditional aims of punishment – retribution and deterrence, the tax applies to

> behavior which is already a crime, the tax allows for sanctions by restraint of Debtors' property, the tax requires a finding of illegal possession of dangerous drugs and therefore a finding of *scienter*, the tax will promote elimination of illegal drug possession, and the tax appears excessive in relation to the alternate purpose assigned, especially in the absence of any record developed by the State as to societal costs. Finally, the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report. All these aspects of the Drug Tax Act lead to the inescapable conclusion that it has deterrence and punishment as its purpose.

Drummond, Trustee et al. v. Department of Revenue (1990), 8 MBR 288. The Federal District Court affirmed the holding and reasoning of Judge Peterson. *In re Kurth Ranch* (D. Mont. April 23, 1991), No. CV-90-084-GF.

The majority attempts to hide behind the veil of facts of these cases to justify that the tax imposed is reasonable and not excessive. In Judge Peterson's case, the DOR attempted to impose a tax assessment in excess of $800,000 on the bankrupt estate of the Kurths. The DOR levied a tax on drugs that were not even defined in the statute. Nor did the DOR provide any rational explanation regarding how it determined the value of the drugs seized. Judge Peterson correctly found that tax to be so grossly disproportionate as to transform it into a criminal penalty. He recognized quite clearly, as did State District Court Judge John S. Henson in *Sorensen*, State District Court Judge Jeffrey D. Sherlock, in *Williams*, and Federal District Court Judge Paul G. Hatfield, in affirming Judge

Peterson, that a criminal penalty by any other name is still a criminal penalty.

For these reasons I would hold that the Montana Drug Tax Act is unconstitutional on its face and would affirm the lower court's decision.

JUSTICE TRIEWEILER concurs in the foregoing dissent of JUSTICE HUNT.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. KURTH; JUDITH M. KURTH, husband and wife; et al., Debtors.	No. 91-35878 D.C. No. CV-90-084-PGH ORDER (Filed May 3, 1993)
ROBERT G. DRUMMOND, Trustee Appellee, v. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Appellant.	

Before: WRIGHT, Senior Circuit Judge, BEEZER, and LEAVY, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Beezer and Leavy vote to reject the suggestion for rehearing en banc and Judge Wright so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

May 18, 1993

Paul Van Tricht
Montana Department of Revenue
Office of Legal Affairs
P.O. Box 202701
Helena, MT 59620-2701

RE: Dept. of Revenue of Montana v. Kurth Ranch, et al.

Dear Mr. Tricht:

The application for an extension of time within the which to file a petition for a writ of certiorari in the above-entitled case was postmarked May 11, 1993 and received May 17, 1993. The application is returned for the following reason(s):

The date of the order denying the petition for rehearing was May 3, 1993. Therefore, the petition for writ of certiorari is due on or before August 1, 1993. Rules 13.1 and 13.4. In your application, you have requested up to and including June 25, 1993 to file your petition for writ of certiorari. Since the due date exceeds the time in which

you are requesting an extension of time, the application does not need to be filed with the Court.

Sincerely,
William K. Suter, Clerk
By: /s/ Jeffrey D. Atkins

In Forma Pauperis Department
(202) 479-3263

Enclosures

cc: James Goetz

Part 1

General Provisions

15-25-101. Short title. This chapter may be cited as the "Dangerous Drug Tax Act".

History: En. Sec. 1, Ch. 563, L. 1987.

15-25-102. Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Dangerous drug" has the meaning provided in 50-32-101.

(2) "Department" means the department of revenue provided for in 2-15-1301.

(3) "Person" means an individual, firm, association, corporation, partnership, or any other group or combination acting as a unit.

History: En. Sec. 2, Ch. 563, L. 1987.

15-25-103 through 15-25-110 reserved.

15-25-111. Tax on dangerous drugs. (1) There is a tax on the possession and storage of dangerous drugs. Except as provided in 15-25-112, each person possessing or storing dangerous drugs is liable for the tax. The tax imposed is determined pursuant to subsection (2). The tax is due and payable on the date of assessment. The department shall add an administration fee of 5% of the tax imposed pursuant to subsection (2) to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process.

(2) With the exception that the tax on possession and storage of less than 1 ounce, 1 gram, or 100 micrograms of dangerous drugs must be that set forth below for 1 ounce, 1 gram, or 100 micrograms, the tax on possession and storage of dangerous drugs is the greater of:

(a) 10% of the assessed market value of the drugs, as determined by the department; or

(b) (i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per gram of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

(3) The tax imposed under this section may be collected before any state or federal fines or forfeitures have been satisfied.

History: En. Sec. 3, Ch. 563, L. 1987; amd. Sec. 1, Ch. 421, L. 1989.

15-25-112. Exemptions. The tax imposed pursuant to 15-25-111 does not apply to any person authorized by state or federal law to possess or store dangerous drugs. The burden of proof of an exemption from 15-25-111 is on the person claiming it.

History: En. Sec. 4, Ch. 563, L. 1987.

15-25-113. Administration and enforcement – department rules. (1) All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such other information which the department may require, in a manner and on a form prescribed by the department.

(2) The deficiency assessment provisions of 15-53-105, the civil penalty and interest provisions of 15-53-111, the criminal penalty provisions of 15-30-321(3), the estimation of tax provisions of 15-53-112, and the statute of limitations provisions of 15-53-115 apply to this tax and are fully incorporated by reference in this chapter. The department may adopt such rules as are necessary to administer and enforce the tax.

History: En. Sec. 5, Ch. 563, L. 1987.

15-25-114. Tax review. A person aggrieved by an assessment pursuant to 15-25-111 or an exemption decision pursuant to 15-25-112 may seek a review of the assessment or exemption decision pursuant to 15-1-211.

History: En. Sec. 6, Ch. 563, L. 1987; amd. Sec. 7, Ch. 811, L. 1991.

Compiler's Comments

1991 Amendment: Substituted "may seek a review of" for "may appeal" and at end substituted "15-1-211" for "Title 15, chapter 2, part 3".

Applicability: Section 31, Ch. 811, L. 1991, provided: "[This act] applies to requests for refunds received by and the notices of additional tax issued by the department of revenue pursuant to [section 1] [15-1-211] after December 31, 1991."

15-25-115. Warrant for distraint – suspension of lien during incarceration. If all or part of the tax imposed by this chapter is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded. The period during which the lien may be enforced is suspended during any period of incarceration of the person upon whom the tax is imposed.

History: En. Sec. 7, Ch. 563, L. 1987; amd. Sec. 2, Ch. 421, L. 1989.

15-25-116 through 15-25-120 reserved.

15-25-121. Accounts. (1) There is an evaluation special revenue account within the state treasury, for use by the department of family services. One-third of the taxes

collected under 15-25-122 shall be deposited in the account.

(2) There is a chemical abuse assessment special revenue account within the state treasury, for use by the department of justice. One-third of the taxes collected under 15-25-122 shall be deposited in the account.

History: En. Sec. 8, Ch. 563, L. 1987; amd. Sec. 3, Ch. 421, L. 1989.

15-25-122. Disposition of proceeds. (1) The department shall transfer all taxes collected pursuant to this chapter, less the administrative fee authorized in 15-25-111(1), to the state treasurer on a monthly basis.

(2) The state treasurer shall deposit one-third of the tax to the credit of the department of family services to be used for the youth evaluation program and chemical abuse aftercare programs.

(3) The treasurer shall credit the remaining two-thirds of the tax proceeds as follows:

(a) one-half to the department of justice to be used:

(i) for grants to youth courts to fund chemical abuse assessments; and

(ii) for grants to counties to fund services for the detention of juvenile offenders in facilities separate from adult jails, as authorized in 41-5-1002; and

(b) one-half to the account created by 44-12-206(3) if a state government law enforcement agency seized the drugs. If a local government law enforcement agency seized the drugs, then that amount must be credited to

the treasurer or finance officer of the local government, be deposited in its general fund and be used to enforce drug laws.

15-25-123. Special revenue account. (1) There is created a special revenue account to be called the dangerous drug tax administration account.

(2) All administrative fees collected under 15-25-111(1) shall be deposited by the department into the dangerous drug tax administration account.

(3) The money in the dangerous drug tax administration account may be expended by the department to administer the tax and pay any refund required by this chapter.

(4) The appropriation made in subsection (3) is a statutory appropriation as provided in 17-7-502.

CONSTITUTION

of the

UNITED STATES OF AMERICA

Amendment 5

Criminal actions– Provisions concerning – Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

List of States With Drug Taxes

ALABAMA	Code of Alab. 1989 Supp. § 40-17A-1 *et seq.*
ARIZONA	Ariz. Rev. Stat. 1989 Supp. 42-1201 *et seq.*
COLORADO	Col. Rev. Stat. 1989 Supp. § 39-28.7-101 *et seq.*
CONNECTICUT	Conn. Gen. Stat. § 12-650 *et seq.*
FLORIDA	Fla. Stat. Ann. § 212.0505
GEORGIA	Ga.Code Ann. 37 § 48-15-1 *et seq.*
IDAHO	Id. Code § 63-4201 *et seq.*
LLINOIS [SIC]	Ill. Stat. Ann 1989 Supp. 120 ¶ 2151 *et seq.*
INDIANA	Ind. Code § 6-7-3
IOWA	Chapt. 421A §§ 421A.1 *et seq.*
KANSAS	Kan. Stat. Ann. § 79-5021 *et seq.*
LOUISIANA	La. Stat. Ann. (Civil) § 47:2601 *et seq.*
MAINE	Me. Rev. Stat. Ann. 1989 Supp. 36 § 4433 *et seq.*
MINNESOTA	Minn. Stat. Ann. 1990 Supp. § 297D.01 *et seq.*
MONTANA	Mont. Code Ann. 1989 Supp. § 15-25-101 *et seq.*
NEBRASKA	Nebr. Rev. Stat. § 77-4301 *et seq.*

NEVADA	Nev. Rev. Stat. Ann. 1989 Supp. § 372A.010 *et seq.*
NEW MEXICO	N. Mex. Stat. Ann. § 7-18A-1 *et seq.*
NORTH CAROLINA	Gen. Stat. of N.C. § 105-113.105 *et seq.*
NORTH DAKOTA	Century Code Ann. 1989 Supp. § 57-36.1-01 *et seq.*
OKLAHOMA	Okl.Stat.Ann. 68 § 450.1 *et seq.*
RHODE ISLAND	Gen. Laws of R.I. 1989 Supp. § 44-49-1 *et seq.*
SOUTH CAROLINA	S.C. Code § 12-21-5010 *et seq.*
TEXAS	Vernon's Tex. Code Ann. (Tax) 1990 Supp. § 159.001 *et seq.*
UTAH	Utah Code Ann. 1989 Supp. 59-19-101 *et seq.*
WISCONSIN	Wisc. Stat. Ann. § 139.87 *et seq.*
WYOMING	Wyo. Stat. Ann. 1989 Supp. § 39-6-401 *et seq.*

No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH-HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, Trustee,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
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August 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED FOR REVIEW

Is the Montana Dangerous Drug Tax, as applied to the Kurths, who have been previously convicted and punished for dangerous drug violations, violative of the Double Jeopardy Clause's prohibition against punishments for the same offense under the rationale of *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989)?

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

The Respondents, Kurth Ranch, et al., ("Kurth") respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 986 F.2d 1308 (9th Cir. 1993) and reprinted in Petitioner's Appendix ("P.A.") at 1.

STATEMENT OF THE CASE

The Kurth family was apprehended by law enforcement personnel for growing marijuana on their Montana farm. (P.A. 29). They were charged with criminal possession and sale of dangerous drugs and ultimately pled guilty to these charges. (P.A. 30). The state trial court imposed various sentences ranging from twenty years in the Montana State Prison, with ten years suspended, for Richard Kurth, to deferred sentences for others. (P.A. 30-32).

The State also prosecuted a civil forfeiture action which resulted in the confiscation of approximately $18,000 from the Kurths. (P.A. 34); *State v. $28,260.26 etc.*, No. DV-87-093 Judgment and Order of Forfeiture (Mont. 12th Dist. Ct., October 27, 1988). The State deposited these funds in the drug forfeiture accounts of the law enforcement agencies involved in the criminal proceedings. *Id.*

The State also, through the Petitioner, Department of Revenue ("D.O.R."), assessed a "tax" of nearly $800,000 against the Kurths and began collection proceedings through the administrative process. (P.A. 14-15, 34). The

basis for this "tax" is the Montana "Dangerous Drug Tax Act," MCA §§ 15-25-101-123 (1987). (P.A. 82).[1]

In September 1988, the Kurths filed a Chapter 11 bankruptcy petition automatically staying the administrative proceedings before the D.O.R. pursuant to 11 U.S.C. § 362(a). (P.A. 15). D.O.R. filed several proofs of claim with the bankruptcy court. *Id.* The ultimate amended proof of claim was for $864,940.99, consisting of $684,914.30 in principal, $113,134.44 in penalties and $66,914.30 in interest. (P.A. 35).

The Kurths filed an adversary proceeding challenging D.O.R.'s amended proof of claim and the constitutionality of the Drug Tax Act. *Id.* The bankruptcy court, after a two-day trial, denied D.O.R.'s amended claim. (P.A. 25, 60).

The bankruptcy court determined, from the evidence presented, that D.O.R.'s tax on the marijuana plants and derivatives was arbitrary and capricious and therefore illegal. (P.A. 60). The court concluded that D.O.R.'s assessment on the remaining marijuana satisfied the requirements of the Drug Tax Act but, as applied to the Kurths, ran afoul of the Double Jeopardy Clause of the

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[1] This Act purports to establish "a tax on the [unlawful] possession and storage of dangerous drugs." MCA § 15-25-111(1) (P.A. 82). "[E]ach person possessing or storing dangerous drugs is liable for the tax" in an amount determined by the department. *Id.* The tax does not apply to any person "authorized by state or federal law to possess or store dangerous drugs." MCA § 15-25-112 (P.A. 84). The burden of proof for an exception from the "tax" is on the person claiming it. *Id.*

United States Constitution, pursuant to *United States v. Halper*, 490 U.S. 435 (1989):

> The tax which I have found to be legally imposed pursuant to Drug Tax Statute on the possession of marijuana exceeds $208,150 (without interest). If D.O.R. were allowed to impose this tax, *without any showing of some rough approximation of its actual damages and costs* which it seeks to recover to make the State whole, I would . . . "be sanctioning the very type of 'clear injustice' which *Halper* prohibits," for, *on such state of this record*, the tax is punishing the debtors twice for the same criminal conduct.

In Re Kurth Ranch, No. 88-40629-11 (Bankr. D. Mont. May 8, 1990) (P.A. 58) (emphasis added).

D.O.R. appealed to the United States District Court. The district court affirmed the bankruptcy court, finding "[t]he order well-reasoned and supported by the evidence of the record:"

> As applied to the factual situation presented, the Montana Dangerous Drug Tax Act simply punishes the Kurths a second time for the same criminal conduct. That fact, coupled with the D.O.R.'s failure to provide the Kurths or the Bankruptcy Court with an accounting of its actual damages or costs, leads to the inescapable conclusion that the subject tax assessments violated the double jeopardy clause of the Fifth Amendment.

In Re Kurth Ranch, No. CV-90-084-GF (D. Mont. Apr. 23, 1991) (P.A. 22) (emphasis added).

D.O.R. appealed to the Ninth Circuit only the district court's affirmance of the bankruptcy court's determination that the $208,150 tax on the harvested marijuana violated the Double Jeopardy Clause. (P.A. 4). In affirming the district court, the Ninth Circuit held that because D.O.R. refused to offer any evidence justifying the imposition of the tax on the Kurths, the tax, as applied to the facts of this case, violated the Double Jeopardy Clause:

> The Kurths were criminally prosecuted for possession and sale of dangerous drugs. The double jeopardy analysis under *Halper* applies. If the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by Revenue, the Kurths are entitled to an accounting in order to determine if the sanction constitutes an impermissible additional punishment.
>
> The record in this case, however, is devoid of the information necessary to make a determination of proportionality. *Despite opportunities to do so before the bankruptcy and district courts, Revenue refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects.*
>
> * * *
>
> *By refusing to offer any evidence justifying its imposition of the tax,* the State has failed to meet the threshold requirements under *Halper. We do not hold that the marijuana tax is unconstitutional on its face; we do hold it is unconstitutional as applied against the Kurths.* The tax assessment levied by Revenue in this case constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause.

In Re Kurth Ranch, 986 F.2d 1308, 1311-12 (9th Cir. 1993) (emphasis added); (P.A. 10-12). D.O.R.'s Petition for rehearing was denied. (P.A. 78).

SUMMARY OF ARGUMENT

The issue before this Court is not whether Montana's Drug Tax Act violates the Double Jeopardy Clause. The issue is whether a civil sanction assessed pursuant to that statute can constitute a second punishment prohibited by this Court's decision in *United States v. Halper,* 490 U.S. 435 (1989). The Ninth Circuit properly concluded, based upon the facts of this case, that D.O.R.'s $208,150 tax constituted a second punishment and is therefore barred by the Double Jeopardy Clause.

While the Ninth Circuit's opinion conflicts with the Montana Supreme Court decision of *Sorensen v. State Dep't of Revenue,* 836 P.2d 29 (Mont. 1992) that conflict is of little significance. To avoid future double jeopardy violations, D.O.R. must simply submit evidence to the trier of fact justifying that portion of the sanction that appears disproportionate to the government's damages – which D.O.R. refused to do in this case, despite the opportunity to do so before the trial court. This superficial conflict notwithstanding, the Montana Supreme Court's legal analysis ignored this Court's decision in *Halper* and was expressly disapproved by this Court in *Austin v. United States,* ___ U.S. ___, 61 U.S.L.W. 4811 (U.S. June 28, 1993).

Contrary to D.O.R.'s assertion, the Ninth Circuit's opinion is consistent with other decisions of this Court as well as other federal and state courts. These decisions recognize that drug taxes are civil sanctions and serve the purposes of retribution and deterrence.

Finally, only one other state court of last resort has considered the application of *Halper* to a civil sanction levied under that state's drug tax act. In *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992) the Illinois Supreme Court applied an analysis similar to the Ninth Circuit's in this case.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS LIMITED TO THE FACTS OF THE CASE AND HAS LITTLE, IF ANY, IMPACT ON THE ABILITY OF D.O.R. OR OTHER STATES TO LEVY OR COLLECT DRUG "TAXES."

The "central issue," according to D.O.R., "is whether the Montana tax on marijuana is a 'penalty' or 'punishment' for purposes of the double jeopardy clause of the Fifth Amendment." Brief for Petitioner 5-6, n. 3. This statement is misleading. It implies that the Ninth Circuit held that Montana's $100.00 per ounce sanction for unlawful possession of marijuana, on its face, violates the Double Jeopardy Clause. The Ninth Circuit did not, however, decide that question. Indeed, the Ninth Circuit refused to find Montana's Drug Tax Act unconstitutional "on its face." *In Re Kurth Ranch*, 986 F.2d at 1312. (P.A. 11).

Instead, the Ninth Circuit issued a narrow ruling based on the record before it: the $208,150 "tax" levied against the Kurths for unlawful possession of marijuana, following criminal punishment for the same conduct, was an impermissible second punishment when D.O.R. refused to offer evidence of any remedial purpose purportedly served by the sanction in question. *Id.* Recognizing the "intrinsically personal" nature of the protection against double jeopardy, the Ninth Circuit assessed the character of the sanction imposed by D.O.R. and, in light of the record, determined that it appeared to qualify as punishment in the plain meaning of the word. *See Halper*, 490 U.S. at 449.

D.O.R. makes this argument because, like the federal government in *Halper*, it resists a case-by-case analysis of the impact of a civil sanction on a person who has previously been subject to criminal prosecution for the same conduct. However, as this Court explained in *Halper*, when the Double Jeopardy Clause is implicated, there is no other alternative. The question is whether a particular person in a particular case has been subjected to "multiple punishments or repeated prosecution for the same offense." *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

In sum, the validity of Montana's Drug Tax Act is not at issue. Rather, it is the application of that statute, to the same conduct that formed the basis of the Kurths' prior criminal prosecution and punishment, that is the basis for the Ninth Circuit's decision. Because the "Double Jeopardy Clause protects against the *possibility* that the government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding [,]" *Halper*, 490 U.S. at 450, n. 10 (emphasis

added), the Ninth Circuit properly applied *Halper* to the facts of this case.

D.O.R. correctly notes that the Ninth Circuit's decision conflicts with the Montana Supreme Court's decision in *Sorensen v. State Dep't of Revenue*, 254 Mont. 61, 836 P.2d 29 (1992). From a practical standpoint, however, this conflict is meaningless and will have little, if any, impact on the ability of D.O.R. or other state governments to levy "taxes" for illegal possession on dangerous drugs. Assuming a future tax "appears to qualify as punishment," *Halper*, 490 U.S. at 449, D.O.R. will simply have to submit evidence of its damages and costs to justify that portion of the sanction that in the trial court's discretion appears disproportionate to the government's damages – a result that is consistent with case law in at least two other states. *See Rehg. v. Illinois Dep't of Revenue*, 605 N.E.2d 525, 539 (Ill. 1992); *State v. Riley*, 479 N.W.2d 234, 236 (Wis. Ct. App. 1991).

In any event, the Ninth Circuit correctly noted that the *Sorensen* decision "ignores the particularized double jeopardy inquiry required under *Halper*." 986 F.2d at 1312, n. 2. (P.A. 11). Moreover, the *Sorensen* court applied the wrong legal analysis when it relied upon *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and *United States v. Ward*, 448 U.S. 242 (1980) to justify its decision that application of Montana's Drug Tax to a person previously punished for unlawful drug possession is not subject to analysis under *Halper*:

> "[t]he question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. *See Mendoza-Martinez*, 372 U.S. at 167, 184; *Ward*, 448 U.S. at 248. *In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in Mendoza-Martinez, and Ward." See e.g., United States v. Halper*, 490 U.S. 435, 447 (1989).

Austin v. United States, ___ U.S. ___, 61 U.S.L.W. 4811, 4813, n. 6 (U.S. June 28, 1993) (emphasis added); *cf. Sorensen*, 836 P.2d at 31-32 (P.A. 67-69).

Sorensen is also flawed because it recognizes no limit to the sanction the State of Montana could arguably impose in pursuit of its purported remedial purpose. In other words, there is nothing in *Sorensen* that suggests a line be drawn at $200.00 per ounce, $1,000 per ounce, or $10,000 per ounce of dangerous drugs. Arguably with each increase in the sanction D.O.R. could assert that the legislature's intent, by increasing the fine, was to recover more of the general costs allegedly caused by drugs in society. *Cf. Sorensen*, 836 P.2d at 31 (P.A. 68-69). Such an argument is inconsistent with the Double Jeopardy Clause's proscription of multiple punishment. *Halper*, 490 U.S. at 451.

In sum, this Court's analysis in *Halper* carries with it an inherent limitation on the amount of sanction a government may impose in a second proceeding for the same conduct that resulted in a prior criminal punishment. In *Halper*, this Court ruled that the government may recover no more than "rough remedial justice." 490 U.S. at 446. Once the recovery exceeds that amount, which is left to

the trial court's discretion, the rationale for the civil sanction disappears and the sanction is simply a second punishment for the same offense for which the individual has already been punished. 490 U.S. at 450.

Here, the Ninth Circuit concluded that the trial court did not abuse its discretion when it found, on the basis of the evidence before it, that D.O.R.'s tax simply punished the Kurths a second time for illegal possession of marijuana. Because the Ninth Circuit's decision turned on the evidence before it, certiorari would be inappropriate. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court does not "grant certiorari to review evidence and discuss specific facts").

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS.

D.O.R. cites this Court to several federal court decisions upholding the validity of the federal marijuana tax.[2] None of the cases cited, however, concerned the issue of double jeopardy. Of significance, however, is *United States v. Sanchez*, 340 U.S. 42 (1950).

In *Sanchez*, this Court determined that the federal marijuana tax was a "civil sanction." 340 U.S. at 45 ("the [marijuana] tax can be properly called a civil rather than a criminal sanction"). Under *Halper* the issue is "whether

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[2] In *Leary v. United States*, 395 U.S. 6 (1969) this Court found the federal marijuana tax to violate the constitutional right against self incrimination. In 1971 Congress repealed this tax. Pub.L. No. 91-513.

a *civil sanction* in application may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 442 (emphasis added). Thus, *Halper* takes *Sanchez* one step further: When does a "civil sanction," like the federal marijuana tax in *Sanchez, in application*, constitute punishment for purposes of double jeopardy analysis? *Sanchez* and the other cases cited by D.O.R. did not consider that question.

Moreover, this Court and federal and state courts have explicitly noted that drug taxes, as civil sanctions, do not serve solely remedial purposes, but also serve the goals of deterrence and retribution. *See Leary*, 395 U.S. at 27 ("We think the conclusion inescapable that the [marijuana tax] statute was aimed at bringing to light transgressions of the marijuana laws"); *Sanchez*, 340 U.S. at 44 (noting the "penal nature" and "close resemblance to a penalty" of the federal marijuana tax act); *Tovar v. Jarecki*, 173 F.2d 449, 451 (7th Cir. 1949) ("we trust it quite plain that this [marijuana tax act] is a penal and not a revenue-raising statute") *cited with approval in Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978); *State v. Berberich*, 811 P.2d 1192, 1200 (Kan. 1991) ("[t]he minutes of the Kansas House and Senate Committees show that the primary purpose of the [drug tax] act was to combat drug usage . . . "); *State v. Durrant*, 769 P.2d 1174, 1181 (Kan. 1989) ("primary purpose" of Kansas drug tax statute "is to discourage or eliminate drug dealing"); *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986) ("we believe the clear intent of [South Dakota's drug tax act] is to provide an extra penalty on possession of controlled substances through unconstitutional means").

In sum, drug taxes are civil sanctions that cannot be said *solely* to serve a remedial purpose but, instead, also serve retributive or deterrent purposes. Thus, the Ninth Circuit properly applied *Halper* to the facts of this case:

> A civil sanction that cannot be said *solely* to serve a remedial purpose but rather can be explained only as *also* serving *either* retribution or deterrent purposes is punishment as we have come to understand the term.

Halper, 490 U.S. at 448 (emphasis added); *cf. Austin*, 61 U.S.L.W. at 4815, n. 12 ("Under *United States v. Halper*, 490 U.S. 435, 448 (1989), the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion") (emphasis in the original).

In short, the Ninth Circuit's decision does not conflict with the decision of another United States Court of Appeals on the same matter. *See* Rule 10(a), Rev. Rules, S.Ct.

III. THE ONLY STATE COURT OF LAST RESORT TO ADDRESS HALPER'S APPLICATION TO DANGEROUS DRUG TAXES, ASIDE FROM MONTANA, REACHED A RESULT SIMILAR TO THE NINTH CIRCUIT.

In another misleading argument, D.O.R. asserts that the Ninth Circuit's Decision "Conflicts With Decisions of Other State Courts of Highest Appeal." Brief of Petitioner at 10-11. This argument is untrue. Of the six cases listed by D.O.R., only two originate from state courts of last resort, and of those two, only one decision, *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992), concerns the application of *Halper* to drug taxes and that decision is consistent with the Ninth Circuit's analysis here.[3]

In *Rehg*, the Illinois Supreme Court applied *Halper* to a drug tax assessment and concluded that a portion of the sanction ($168,000) "may be sufficiently disproportionate to the State's costs as to constitute a second punishment within the meaning of the double jeopardy clause." 605 N.E.2d 539. The court remanded the case to the district court for an accounting of the state's costs and damages – which D.O.R. refused to do in this case, despite the opportunity to present such evidence before the trial court. *In Re Kurth Ranch*, 986 F.2d at 1312 (P.A. 11); *see also In Re Kurth Ranch*, No. 88-40629-11 (Bankr. D. Mont. May 8, 1990) (P.A. 55-56).

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[3] The Kansas Supreme Court in *State v. Berberich*, 811 P.2d 1192 (Kan. 1991) did not address the issue of double jeopardy. Of the four decisions from intermediate courts of appeal in Alabama, Florida and Wisconsin, only one decision, *State v. Riley*, 479 N.W.2d 234 (Wis. Ct. App. 1991), addressed the issue of double jeopardy. There, the Wisconsin Court applied *Halper* to the facts before it and upheld the tax. The court stated, however, that "in some cases . . . an accounting may be required." 479 N.W. 2d at 236. *Harris v. State Dep't of Revenue*, 563 So.2d 97 (Fla. Dist. Ct. App. 1990) did not concern double jeopardy. *Hyatt v. State Dep't of Revenue*, 597 So.2d 716 (Ala. Civ. App. 1992) involved separate prosecutions by the federal and state governments, thus double jeopardy was not an issue. In *Briney v. State Dep't of Revenue*, 594 So.2d 120 (Ala. Civ. App. 1991) the opinion is unclear whether the defendant was criminally prosecuted, and if so, by which sovereign.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 1993

No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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September 1993

QUESTION PRESENTED

In direct conflict with a prior decision of the Montana Supreme Court, the court of appeals held that a tax assessment under the Montana Dangerous Drug Tax violated the double jeopardy provisions of the United States Constitution.

The question presented is:

Can assessment of a state tax on the possession and storage of dangerous drugs, imposed separate and apart from any criminal penalty, violate the double jeopardy prohibitions of the Fifth and Fourteenth Amendments to the United States Constitution?

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In response to the brief in opposition to the petition for writ of certiorari by the Respondents, Kurth Ranch, et al., ("Taxpayers"), the Petitioner, the Montana Department of Revenue ("DOR"), submits the following reply brief.

ARGUMENT

The Taxpayers' argument illustrates the nature of the conflict between the decision of court of appeals and the decision of the Montana Supreme Court in *Sorenson v. State Dep't of Revenue*, 836 P.2d 29 (Mont. 1992). In the Taxpayers' brief the Montana Drug Tax effortlessly goes from a tax to a "civil sanction" and a "punishment" without ever justifying the critical leap from tax to civil sanction. A similar unexplained metamorphosis occurred in the Court of Appeals' decision below.

A. The Montana Supreme Court Clearly Held the Montana Drug Tax Was Not a Civil Sanction – the Ninth Circuit Held It Was a Civil Sanction.

The Taxpayers argue that the Montana Supreme Court in the *Sorenson* case did not understand this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989). They assert, the Montana Court did not realize that this Court's decision applied to "civil sanctions" and not just criminal punishment. That argument fails. The Montana Supreme Court in *Sorenson* stated the issue as follows:

> Next the Drug Tax may violate double jeopardy if it is an *excessive civil sanction*. *United*

> *States v. Halper* (1989), 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487. In *Halper*, the Court stated that *civil as well as criminal sanctions may constitute punishment and violate double jeopardy when the sanction, as applied to the individual, serves the goal of punishment* rather than the remedial purpose of compensating the government for its loss. *Halper* at 448, . . .
>
> The DOR contends that double jeopardy does not attach to Montana's Drug Tax because the tax is an excise tax for raising revenue, not a criminal penalty or civil sanction . . . (Emphasis supplied.)

836 P.2d at 30.

The Montana Supreme Court clearly understood that *Halper* applied to both criminal and civil sanctions and rejected the argument that the Montana Drug Tax was a civil sanction of any nature.

B. Taxes, Including the Montana Drug Tax, Are Not Civil Sanctions.

This Court has defined "taxes" as "those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of the undertakings authorized by it." *New York v. Feiring*, 313 U.S. 283, 285 (1941).

It has never been necessary to validate a tax by showing either the "damages" caused by the taxpayer or the burden the taxpayer placed on government or society because this Court has repeatedly held:

> [T]here is no requirement . . . the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. . . . A *tax is not an assessment of benefits. It is*, as we have said, *a means of distributing the burden of the cost of government*. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. (Emphasis supplied.)

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981).

The Montana Supreme Court found the "intention of the Montana Legislature [when enacting the drug tax was] to enact a revenue producing tax on drugs is clear." 836 P.2d at 31. Relying on *Commonwealth Edison* the Montana Supreme Court held: "unlike the civil sanctions in *Halper* where such proof may be required, a tax requires no proof of remedial costs on the part of the state." 836 P.2d at 33.

This Court's latest analysis of the term "sanction" is found in *United States Dept. of Energy v. Ohio*, 112 S. Ct. 1627 (1992). In that decision, this Court equated "civil sanctions" to "coercive" and "punitive fines."

Taxes, including the Montana Drug Tax, are simply not civil sanctions. The lower federal courts erred when they held that a tax was a civil sanction.

C. *Austin* Does Not Address the Issue Raised in This Petition.

The Taxpayers rely upon this Court's recent decision in *Austin v. United States*, 61 U.S.L.W. 4811 (U.S. June 28, 1993) to argue that the petition need not be granted. However, *Austin* does little to resolve the basic conflict between the decision of the Court of Appeals and the decision of the Montana Supreme Court in *Sorenson* over whether the Montana Drug Tax is a tax or a civil sanction.

In *Austin* the issue was whether forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7) were fines within the meaning of the Eighth Amendment's Excessive Fines Clause. There was no question that the statute imposed a forfeiture since it states: "The following shall be subject to forfeiture to the United States . . .." 21 U.S.C. § 881(a). This Court found that a forfeiture was a fine under the Eighth Amendment after an analysis of what "forfeitures" were at the common law.

On pages 8 and 9 of their brief in opposition, the Taxpayers quoted footnote 6 in the *Austin* case out of context. That footnote was to this sentence of the decision:

> Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.

Austin, 61 U.S.L.W. at 4813.

More importantly the Taxpayers omitted the final sentence of footnote 6: "Since in this case we deal only with the question whether the Eighth Amendment's

Excessive Fines Clause applies, we need not address the application of those [*Kennedy v. Mendoza-Martinez* and *Ward*] tests." 61 U.S.L.W. at 4813, n. 6. Therefore, *Austin* and *Halper* do not address the central issue in this case of what is and what is not a "civil sanction" under the double jeopardy clause of the Fifth Amendment.

The Montana Supreme Court in *Sorenson* was correct, and the Court of Appeals was wrong, under the standards set out by this Court. The Montana Drug Tax is not a civil sanction.

D. The Respondent Misinterpreted Decisions in Other State Courts and This Court's Decision in *Sanchez* – Those Courts Held Drug Taxes Were Taxes and Not Penalties.

The Taxpayers misread many of the decisions by appellate courts in other states. For example, in *Rehg v. Illinois*, 605 N.E.2d 525 (Ill. 1992), the Illinois Supreme Court upheld a tax on drugs of $42,000. It remanded the case back to the lower court for a hearing on the statutory 400% penalty ($168,000) imposed for failing to pay the drug tax. No part of the Montana tax assessment at issue in this case is a penalty.

The amicus brief submitted by the States of Kansas, Colorado, Georgia, Idaho, Minnesota, Nebraska, and Texas discusses the state court decisions that, contrary to Taxpayers' argument, conflict with the circuit court's decision. Similarly, the Taxpayers' analysis of many of the federal cases also is incorrect.

The Taxpayers' argument that this Court's decision in *United States v. Sanchez,* 340 U.S. 42 (1950), supports the decision of the circuit court is refuted by the history of that case which is shown in the briefs filed by the United States Solicitor General. As the Solicitor General's briefs showed a central question in *Sanchez* was whether a tax of $100 per ounce on marijuana was a tax or a punishment.[1] Subsequent federal court decisions cited in the petition for certiorari in this case specifically recognized that *Sanchez* held that a tax on marijuana was a true tax and not a penalty.[2]

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[1] The Solicitor General's statement of the case was:

> On February 21, 1949, the United States brought this suit in the District Court for the Northern District of Illinois to collect taxes of $8,701.65, assessed against appellees on February 27, 1943, under Section 2590 (a)(2) of the Internal Revenue Code, upon the transfers of marihuana made by them. (R. 1.) Appellees' answers denied on various grounds that they were liable for such taxes. (R. 2-3.) At the opening of the trial on March 28, 1950, appellees, relying on *Tovar v. Jarecki,* 173 F.2d 449, in which the Court of Appeals for the Seventh Circuit had held Section 2590 (a)(2) to be "a penal and not a revenue-raising statute * * * a penalty inflicted without a hearing and not a tax", moved to dismiss the complaint (R. 6). The district court, apparently regarding the *Tovar* case as an authoritative holding that Section 2590(a)(2) is unconstitutional, granted the motion (R. 6), and an order was entered dismissing the complaint. (R. 3.).

Brief for United States, *United States v. Sanchez,* Cause No. 81, October Term, 1950 p. 2-3.

[2] The Taxpayers also rely upon cases overruled by *Sanchez.* For example, they continue to rely on *Tovar v. Jarecki,* 173 F.2d 449 (7th Cir. 1949), despite at least one federal court decision which recognized that *Sanchez* overruled *Tovar*:

CONCLUSION

No amount of argument can hide the unequivocal conflict between the *Sorenson* decision and the decision of the Court of Appeals in this case. The two decisions are irreconcilable. Both courts were fully aware of the decisions of the other court when they made their respective decisions; there is little hope that these two courts will resolve this conflict on their own.

This Court's rules recognize the responsibility for resolving conflicts between the courts of concurrent jurisdictions over the meaning of the United States

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> Plaintiffs cite the case of *Tovar v. Jarecki,* 173 F.2d 449, from the Court of Appeals for the Seventh Circuit. In his opinion in that case, Judge Sherman Minton reversed an order of the district court dismissing a complaint wherein the collection of a tax on marihuana was sought to be enjoined on the grounds . . . that the alleged tax was not indeed a tax but a penalty. . . . ***The holding in this case was subsequently overruled by the Supreme Court in the case of United States v. Sanchez,*** 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed 47 (emphasis supplied).

Lassoff v. Gray, 168 F. Supp. 363, 366 (W.D. Ky., 1958).

Constitution. The Court should exercise its power and *GRANT* the petition to resolve this conflict.

Respectfully submitted,

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September 1993

No. 93-144

In The
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DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,
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v.

KURTH RANCH;
KURTH HALLEY CATTLE COMPANY;
RICHARD M. and JUDITH KURTH, husband and wife;
CLAYTON H. and CINDY K. HALLEY, husband and wife;
ROBERT G. DRUMMOND, Trustee,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF BY THE STATES OF KANSAS, COLORADO, GEORGIA, IDAHO, MINNESOTA, NEBRASKA, AND TEXAS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI BY THE STATE OF MONTANA

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The States of Kansas, Colorado, Georgia, Idaho, Minnesota, Nebraska, and Texas, through their respective Attorneys General, submit this brief *amicus curiae* pursuant to S. Ct. R. 37.2 in support of the petition for writ of certiorari by the State of Montana.

QUESTION FOR REVIEW

In its petition for writ of certiorari, the State of Montana presents the following question for review (Brief in Support of Application of Petition for Writ of Certiorari [hereinafter "Brief"] at i):

> CAN ASSESSMENT OF A STATE TAX ON THE POSSESSION AND STORAGE OF DANGEROUS DRUGS, IMPOSED SEPARATE AND APART FROM ANY CRIMINAL PENALTY, VIOLATE THE DOUBLE JEOPARDY PROHIBITIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

The State of Montana seeks review of a decision of the Ninth Circuit Court of Appeals affirming lower court decisions invalidating in large part Montana's drug tax assessment issued to the debtors/Kurths as allegedly violative of the double jeopardy clause of the Fifth Amendment of the United States Constitution. The Court of Appeals relied on this Court's decision in *U.S. v. Halper*, 490 U.S. 435 (1989), to determine that Montana's tax assessment constituted additional "punishment" for conduct for which the Kurths had already been criminally punished. *Kurth*, 986 F.2d at 1312.

THE INTERESTS OF THE *AMICI CURIAE*

All *amici* have enacted laws imposing a tax on the possession, sale, *etc.*, of controlled substances, and seek the efficient administration and enforcement of such laws.

Citations to those laws—and to the laws of the twenty (20) other States which have enacted drug tax statutes or which otherwise can or do tax the possession or sale of controlled substances—are contained in the appendix of this brief. *Amici* have also enacted other laws imposing taxes—*e.g.*, income, sales and use, property, franchise, cigarette, liquor, gasoline, special fuel, withholding, *etc.*—and likewise seek the efficient administration and enforcement of such laws.

The decision of the Ninth Circuit Court of Appeals in this case imposes a legally inappropriate double jeopardy consideration on the administration and enforcement of drug and other taxes. The case is binding precedent in future cases in the Ninth Circuit, and persuasive authority elsewhere where the double jeopardy question at issue in this case remains open. As such, the decision effectively frustrates the administration and enforcement of drug tax laws nationwide. The decision also effectively frustrates the administration and enforcement of tax laws generally because the decision can be read to reach tax cases generally.

SUMMARY OF THE ARGUMENT

This Court has by Rule set out general standards for the granting of petitions for writs of certiorari. Certain of those standards apply here. First, the petition for certiorari presents a question which has not but should be determined by this Court: whether this Court's double jeopardy decision in the *Halper* case applies to tax matters. Resolution of this question is important because of the effect the decision below—applying *Halper*—will have on the administration and enforcement of drug and other tax matters. Second, the decision below is patently in conflict with numerous decisions of courts of last resort and other courts on the question whether, and the extent to which, tax matters are subject to a double jeopardy analysis. Finally, the decision below departed from the usual course of ju-

dicial proceedings by improperly importing the *Halper* double jeopardy analysis into a tax matter, by extending *Halper* beyond its facts, and by failing to accord Montana's tax assessment the presumption of constitutionality required of State tax enactments.

ARGUMENTS AND AUTHORITIES:

THIS COURT SHOULD GRANT THE STATE OF MONTANA'S PETITION FOR A WRIT OF CERTIORARI

This Court's Rule 10 applies to the grant of petitions for writ of certiorari.[1] *Amici* submit that the applicability to

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[1] This Court's Rule 10 relating to the grant of petitions of writ of certiorari provides as follows:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

this case subsections (a)—decisions in conflict and departure from accepted judicial proceedings—and (c)—unresolved and important federal questions—compel this Court to grant the State of Montana's petition for a writ of certiorari:

I. THE COURT OF APPEALS DECIDED A QUESTION WHICH HAS NOT BUT SHOULD BE DECIDED BY THIS COURT—*i.e.* THE APPLICABILITY OF THIS COURT'S DECISION IN *U.S. v. Halper*, 490 U.S. 435 (1989), TO TAX ASSESSMENTS

This Court has not previously determined whether the double jeopardy clause—with its attendant considerations—applies to what are plainly civil, administrative tax proceedings. The Court of Appeals in the case at bar, however, extended this Court's Fifth Amendment double jeopardy ruling in *U.S. v. Halper*, 490 U.S. 435 (1989), to a drug tax matter, and by similarly erroneous extension, to tax matters generally. The correctness of this unwarranted extension of *Halper* should be determined by this Court because the ruling will frustrate tax administration and enforcement and create uncertainty in the area.[2]

[2] The commentators have recognized uncertainty concerning the reach of *Halper*. *E.g.*, Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 Washington U.L. Quarterly 929, 977-91 (1990); Elizabeth S. Jahncke, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 New York U.L. Rev. 112, 114 (1991); Note, Nelson T. Abbott, *United States v. Halper: Making Double Jeopardy Available in Civil Actions*, 6 Brigham Young U.J. Public Law 551, 561-73 (1992); Note, Lynn C. Hall, *Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause*, 65 Washington L. Rev. 437, 445-453 (1990); Note, Andrew Z. Glickman, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After United States v. Halper*, 76 Virginia L. Rev. 1251, 1267-1284 (1990); Note, Lauren O. Clapp, *United States v. Halper: Remedial Justice and Double Jeopardy*, 68 North Carolina L. Rev. 979, 992-94 (1990).

Absent review by this Court, the frustration and uncertainly will continue. This Court has recognized the problems caused the States by the possession and sale of controlled substances. *E.g., Harmelin v. Michigan*, __ U.S. __, 111 S.Ct. 2680, 115 L. Ed. 2d 836, 870 (1991)(Kennedy, J., concurring). *See also Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989). The problems caused the States by the possession and sale of controlled substances will undoubtedly continue. With continued possession and sale of controlled substances will come continued drug tax assessments by the States; *amici* do not anticipate that current drug tax laws in the various States will be repealed en masse. As such, the decision below directly impacts the administration and enforcement of drug tax laws.

This Court has also recognized the substantial interests that the States have in raising revenue by taxation. *E.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981). Clearly, these other tax laws will also not be generally repealed by the States. Given that the critical connection in *Halper* between the prior proceeding and the subsequent proceeding is not the type of tax involved, but rather whether the subsequent proceeding constitutes "punishment," the impact of the Court of Appeals' decision is not limited to *drug* tax cases. As such, the potential impact of the decision on tax matters generally is virtually limitless. Regardless of the correctness of the Court of Appeals' decision, the Court should end the frustration and uncertainty by accepting the case for hearing on the merits.

II. THE COURT OF APPEALS' HOLDING THAT *Halper* APPLIES TO BAR MONTANA'S DRUG TAX ASSESSMENT CONFLICTS WITH NUMEROUS DECISIONS OF THE COURTS OF LAST RESORT AND THOSE OF OTHER COURTS INCLUDING THOSE OF THE STATE OF MONTANA HOLDING TO THE CONTRARY

In its brief in support of its petition for a writ of certiorari, the State of Montana sets out at length the determination by the Montana Supreme Court in *Sorenson v. State Department of Revenue*, 254 Mont. 61, 836 P.2d 29 (1992), that this Court's decision in *Halper* does not apply to a drug tax assessment, and highlights the patent and irreconcilable conflict caused by the decision of the Court of Appeals (Brief at 4-6). The State of Montana also lists the numerous other decisions—federal and State—with which the Court of Appeals' decision plainly conflicts (Brief at 7-11).[3]

Not fully elaborated on in the State of Montana's brief, however, is that the other decisions cited therein and other decisions not cited reject the premise of the court's decision below that a drug tax assessment constitutes a "punishment," penalty, or sanction:

In *Rehg v. Ill. Dept. of Revenue*, 152 Ill. 2d 504, 178 Ill. Dec. 731, 605 N.E. 525 (1992), the Illinois Supreme Court first determined that the drug tax and penalty there challenged were not so severe as to amount to a "criminal penalty" and therefore the drug tax law was not unconstitutional on its face. 650 N.E.2d at 533. The Court next

[3] In *Austin v. United States*, 61 U.S.L.W. 4811, No. 92-6073 (U.S. Sup. Ct. June 28, 1993), this Court relied on a conflict among the federal circuits in granting certiorari. 61 U.S.L.W. at 4812.

considered the constitutionality of the tax *penalty* as applied to the taxpayer. The Court clearly assumed, however, the validity of the *tax* itself, noting that the failure to pay the tax was "a loss to the State of $42,000 in tax revenue." *Id.* at 536.[4] The Ninth Circuit's decision in *Kurth* plainly conflicts with the Illinois Supreme Court's decision in *Rehg*.

In *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993), the Iowa Supreme Court rejected the claim that the drug tax was violative of due process as a punishment not a tax. The Court held, *inter alia*, that (*id.* at 445):

> We see no substantial difference between chapter 421A and the federal marijuana statute that was upheld in [*U.S. v.*] Sanchez [, 340 U.S. 42 (1950)]. We view the chapter 421A tax and penalty as civil, rather than as criminal, sanctions and as a proper exercise of the State's taxing power.

The Ninth Circuit's decision in *Kurth* plainly conflicts with the Iowa Supreme Court's decision in *Gallup*.

In *State v. Berberich*, 248 Kan. 854, 862-68, 811 P.2d 1192 (1991), the Kansas Supreme Court, rejected the claim that the drug tax was a penalty contrary to the due process clause, relying on this Court's decision in *U.S. v. Sanchez*, 340 U.S. 42 (1950), upholding the now-repealed Marijuana Tax Act against a similar challenge. *Accord State v. Matson*, 14 Kan. App. 2d 632, 637-40, 798 P.2d 488 (1990). The Ninth Circuit's decision in *Kurth* plainly conflicts with the Kansas Supreme Court's and the Kansas Court of Appeals' decisions in *Berberich* and *Matson*.

[4] The rest of the Court's discussion directed at the propriety of the four-fold penalty for the failure to timely pay the tax, 605 N.E.2d at 534-39, is not relevant to the case at bar. The Court will recall that the case at bar involves the constitutionality of the State of Montana's *tax* assessment, not its assessment of *penalty*.

In *Hyatt v. State Dept. of Revenue,* 597 So. 2d 716, 718-19 (Ala. App. 1992), the Alabama Court of Appeals rejected the defendant's implicit claim that imposition of the tax and penalty violated double jeopardy, expressly noting this Court's decision in *Halper (id)*:

> We consider the [drug tax] Act in this case to be remedial in that it is an effort to recover from those who reap great profits from their illegal and deadly transactions, taxes which they would otherwise escape. Such is the declared purpose of the tax. [Citation omitted] A penalty for nonpayment of the tax, though heavy in this case, is common to all taxpayers who fail to pay their lawful taxes. [Citation omitted]

The Ninth Circuit's decision in *Kurth* plainly conflicts with the Alabama Court of Appeals' decision in *Hyatt.*

In *Birney v. State,* 594 So. 2d 120, 123-24 (Ala. App. 1991), *cert. denied* (1992), the Alabama Court of Appeals held *Halper* inapplicable to the assessment of drug tax, and rejected the double jeopardy claim, explaining *(id.)*:

> In this case, the [drug tax] Act does not impose liability that is fundamentally punitive. Rather, the Act is a remedial measure whereby those who have previously escaped taxation may finally be assessed the amount they owe, with the same penalties for nonpayment to which all taxpayers are subject. [Citation omitted] We find that the Act's remedial purpose far outweighs any punitive effect it may have.

The Ninth Circuit's decision in *Kurth* plainly conflicts with the Alabama Court of Appeals' decisions in *Hyatt* and *Birney.*

In *Harris v. State, Dept. of Revenue,* 563 So. 2d 97, 98, *cert. denied* (Fla. App. 1990), the Florida Court of Appeals rejected the taxpayer's claim that the law "imposes an im-

proper penalty or fine and not a tax," relying on this Court's decision in *Sanchez,* 340 U.S. 42 (1950), noted above. The Ninth Circuit's decision in *Kurth* plainly conflicts with the Florida Court of Appeals' decision in *Harris.*

In *Jackson v. Sharp,* 846 S.W.2d 144 (Tex. App. 1993), the Texas Court of Appeals rejected the claim—in another context—that Texas' drug tax law was not a true tax finding little difficulty denominating the law a "valid tax." *Id.* at 147. The Court noted, *inter alia,* that (*id.* at 146):

> The Controlled Substances Tax appears to be a tax on its face and operates as a revenue-generating measure. [Statutory citation omitted] We decline to invalidate it as a tax simply because it may also have been intended to deter the possession or distribution of illegal drugs or to make lawbreaking less profitable.

The Ninth Circuit's decision in *Kurth* plainly conflicts with the Texas Court of Appeals' decision in *Jackson.*

In *State v. Riley,* 166 Wis. 2d 299, 479 N.W.2d 234 (1991), *rev. denied* (1992), the Wisconsin Court of Appeals rejected the claim that *Halper* did not permit the imposition of a one-for-one fine, *i.e.* a fine equal in amount to the amount of the drug tax that he had failed to pay, 479 N.W.2d at 235-36, noting that (*id.* at 236):

> Unlike the penalty in *Halper,* which was so grossly disproportionate [to] the government's actual damages, the penalty assessed against Riley was merely equal to the tax he failed to pay. Indeed, the penalty is less burdensome than the "fixed-penalty-plus-double-damages" provisions noted with approval by the *Halper* court. We agree with the state that this "one-for-one penalty" cannot reasonably be characterized as "so extreme and so divorced from the Government's damages" that it may be considered punitive. *Halper,* 490 U.S. at 442.

The Court implicitly assumed the validity of the underlying drug tax itself. The Ninth Circuit's decision in *Kurth* plainly conflicts with the Wisconsin Court of Appeals' decision in *Riley*.

The Court of Appeals' decision plainly conflicts with numerous decisions from several States including the State of Montana. This Court should take the opportunity, as it has in the past, to resolve the conflict.

III. THE COURT OF APPEALS' DECISION SANCTIONS SUCH A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS—*i.e.* THE APPLICATION OF A DOUBLE JEOPARDY ANALYSIS TO CIVIL, ADMINISTRATIVE TAX PROCEEDINGS—AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The Court of Appeals' application of *Halper's* double jeopardy analysis to a civil, administrative tax matter, sanctions such an unusual and extreme departure from the usual course of judicial proceedings as to warrant this Court's exercise of its power of supervision. The Court of Appeals not only improperly imported a double jeopardy consideration into the analysis of a plainly civil, administrative tax proceeding, but extended this Court's *Halper* decision beyond its terms. The Court also failed to accord the State of Montana's drug tax assessment the presumptive constitutionality required by this Court in the review of State tax enactments.

In *U.S. v. Sanchez*, 340 U.S. 42 (1950), discussed at length by the State of Montana in its Brief (at 8-9), this Court held constitutional section 7 of the "Marijuana Tax Act," previously 26 U.S.C. § 2590, in a suit brought by the United States to recover $8,701.65 in tax and interest. Defendants there claimed that the tax was unconstitutional

"on the ground [that] it levied a penalty, not a tax." 340 U.S. at 43. Determining the claim meritless, this Court cautioned (*id.* at 44-45):

> First. It is beyond serious question that a tax does not cease to be valid merely because it regulates discourages, or even definitely deters the activities taxed, even though the revenue obtained is obviously negligible, or the revenue purpose of the tax is secondary. [Citation omitted.] The principle applies even though the revenue obtained is obviously negligible, [citation omitted], or the revenue purpose of the tax may be secondary, [citation omitted].
>
> * * *
>
> The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect.[5]

The vitality of *Sanchez* was confirmed in this Court's decision in *City of Pittsburgh v. Alco Parking Corporation*, 417 U.S. 369 (1974). This Court considered a due process attack on a "20% tax on the gross receipts obtained from all transactions involving the parking or storing of a motor vehicle at a nonresidential parking place in return for a consideration." *Id.* at 370. The State's highest court struck the tax as unconstitutional, holding the law so unreasonably burdensome as to amount to a taking of property without due process of law (*id.* at 373).

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[5] As noted above, *Sanchez* has been cited with approval by a number of State appellate courts considering the constitutionality of the various States' drug tax laws. *Harris v. State*, 563 So.2d 97, 99, *cert denied* (Fla. App. 1990); *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993); *State v. Matson*, 14 Kan. App. 2d 632, 639-40, 798 P.2d 488 (1990); *State v. Berberich*, 248 Kan. 854, 866, 811 P.2d 1192 (1991); *Sorenson v. State Department of Revenue*, 254 Mont. 61, 836 P.2d 29, 31-32 (1992).

This Court reversed, explaining (*id.* at 375, 376):

> There are several difficulties with this position. The ordinance on its face recites that its purpose is "[t]o provide for the general revenue by imposing a tax . . . ," and in sustaining the ordinance against an equal protection challenge, the state court itself recognized that commercial parking lots are a proper subject for special taxation and that the city had decided, "not without reason, that commercial parking operations should be singled out for special taxation to *raise revenue* because of traffic related problems engendered by these operations." 453 Pa, at 257, 307 A2d, at 8958 (emphasis added).
>
> It would have been difficult from any standpoint to have held that the ordinance was in no sense a revenue measure. The 20% tax concededly raised substantial sums of money; and even if the revenue collected had been insubstantial [citation omitted], or the revenue purpose only secondary, [citation omitted], we would not necessarily treat this exaction as anything but a tax entitled to the presumption of the validity accorded other taxes imposed by a State.
>
> * * *
>
> [T]he judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business.[6]

[6] This Court has accorded similar deference to the validity of tax enactments against equal protection, *e.g., Kahn v. Shevin,* 416 U.S. 351, 355-56 (1974), and commerce clauses attacks, *e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 622-25 (1981). *See also Regan v. Taxation with Representation,* 461 U.S. 540, 546-48 (1983).

The Court of Appeals in the case at bar, however, referred to *Sanchez* almost in passing, distinguishing it on the sole ground that it did not involve a prior criminal conviction of the taxpayer. *Kurth,* 986 F.2d at 1311.

Nor did this court in *Halper* state or even suggest that a double jeopardy analysis applies to tax matters such as in the case at bar. In fact, this Court plainly cautioned against an overbroad reading of its decision (490 U.S. at 449):

> What we announce now is ***a rule for the rare case,*** the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused [emphasis supplied].

In addition to the required limited application of *Halper,* this Court long ago recognized the broad presumptive validity of State tax enactments:

> When the constituted authority of the State undertakes to exert the taxing power, and the question is brought before this court, every presumption in its favor is indulged, and only demonstrated usurpation of power will authorize judicial interference with legislative action.

Walters v. St. Louis, 347 U.S. 231, 237-38 (1954) (quoting *Green v. Frazier,* 253 U.S. 233, 239 [1920]). The Court of Appeals wholly failed to indulge this presumption.

In sum, the Court of Appeals failed to recognize that this Court—in *Sanchez* and its progeny, and as a general

matter—have deferred to the presumptive validity of State legislative tax enactments. Nor is there any basis under *Halper* for the extension of double jeopardy principles to plainly civil, administrative tax matters. This Court should exercise its powers of supervision to correct the Court of Appeals' departure from these accepted principles.

CONCLUSION

This Court's Rule 10 permits the exercise of jurisdiction over this case by the granting of the State of Montana's petition for a writ of certiorari. The Court should grant the petition due to the significant and far-reaching consequences for State tax enforcement caused by the Court of Appeals' misapplication of a double jeopardy analysis to a presumptively legitimate State tax assessment. The Court should also grant the petition due to the decision's patent and irreconcilable conflict with numerous State court decisions. Finally, the Court should grant the petition due to the Court of Appeal's departure from the accepted course of judicial proceedings, *i.e.* the decision is very clearly wrong.

Respectfully submitted,

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APPENDIX

1. ALABAMA	Code of Alab. 1989 Supp. § 40-17A-1 *et seq.*
2. ARIZONA	Ariz. Rev. Stat. 1989 Supp. 42-1201 *et seq.*
3. COLORADO	Col. Rev. Stat. 1989 Supp. § 39-28.7-101 *et seq.*
4. CONNECTICUT	Conn. Gen. Stat. § 12-650 *et seq.*
5. FLORIDA	Fla. Stat. Ann. § 212.0505
6. GEORGIA	Ga. Code Ann. 37 § 48-15-1 *et seq.*
7. IDAHO	Id. Code § 63-4201 *et seq.*
8. ILLINOIS	Ill. Stat. Ann. 1989 Supp. 120 ¶ 2151 *et seq.*
9. INDIANA	Ind. Code § 6-7-3
10. IOWA	Chapt. 421A § 421A.1 *et seq.*
11. KANSAS	Kan. Stat. Ann. § 79-5021 *et seq.*
12. LOUISIANA	La. Stat. Ann. (Civil) § 47:2601 *et seq.*
13. MAINE	Me. Rev. Stat. Ann. 1989 Supp. 36 § 4433 *et seq.*
14. MINNESOTA	Minn. Stat. Ann. 1990 Supp. § 297D.01 *et seq.*
15. MONTANA	Mont. Code Ann. 1989 Supp. § 15-25-101 *et seq.*
16. NEBRASKA	Nebr. Rev. Stat. § 77-4301 *et seq.*
17. NEVADA	Nev. Rev. Stat. Ann. 1989 Supp. § 372A.010 *et seq.*
18. NEW MEXICO	N. Mex. Stat. Ann. § 7-18A-1 *et seq.*
19. NORTH CAROLINA	Gen. Stat. of N.C. § 105-113.105 *et seq.*
20. NORTH DAKOTA	Century Code Ann. 1989 Supp. § 57-36.1-01 *et seq.*
21. OKLAHOMA	Okl. Stat. Ann. 68 § 450.1 *et seq.*

22. ***RHODE ISLAND***	Gen. Laws of R.I. 1989 Supp. § 44-49-1 *et seq.*
23. ***SOUTH CAROLINA***	S.C. Code § 12-21-5010 *et seq.*
24. ***TEXAS***	Vernon's Tex. Code Ann. (Tax) 1990 Supp. § 159.001 *et seq.*
25. ***UTAH***	Utah Code Ann. 1989 Supp. 59-19-101 *et seq.*
26. ***WISCONSIN***	Wisc. Stat. Ann. § 139.87 *et seq.*
27. ***WYOMING***	Wyo. Stat. Ann. 1989 Supp. § 39-6-401 *et seq.*

No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the assessment of a state tax of $181,100 on the possession and storage of 1,811 ounces of marijuana, imposed separate and apart from any criminal penalty, violated the double jeopardy prohibitions of the Fifth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 986 F.2d 1308 (9th Cir. 1993) (Appendix to the Petition [hereinafter Pet. App] 1a) The opinion of the district court, *Drummond v. Dept. of Revenue*, No. CV-90-084-PGH, 1991 WL 365065, (D. Mont., April 23, 1991) is unreported. (Pet. App. 13a) The opinion of the bankruptcy court is reported at 145 B.R. 61 (Bankr. D. Mont., May 8, 1990). (Pet. App. 24a)

The opinion of the Montana Supreme Court, which conflicts with the decision of the federal courts below, is reported at 836 P.2d 29 (1992). (Pet. App. 62a)

JURISDICTION

The decision of the court of appeals was entered February 26, 1993. A Petition for Rehearing with Suggestion for En Banc Rehearing was filed pursuant to Rules 35 and 40, Fed. R. App. P. That petition was treated as timely and denied on May 3, 1993. (Pet. App. 78a) The petition also was treated as timely by the clerk of this Court. (Pet. App. 79a) This Petition for Certiorari was filed July 28, 1993, and was granted September 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the constitutionality of a tax assessment under the Montana Dangerous Drug Tax Act,

Mont. Code Ann. §§ 15-25-101 through 123 (1987) (the "Montana Tax"). This tax is on the possession or storage of dangerous drugs including marijuana. The part of the tax at issue provides:

> "[T]he tax on possession and storage of dangerous drugs is the greater of: (a) 10% of the assessed market value of the drugs, as determined by the [Montana Revenue] department; or (b)(i) $100 per ounce of marijuana . . . "

The entire Montana Tax is set out in the Appendix to this Brief [hereinafter Brf. App.] at 1.

The provision of the United States Constitution involved in this case is the double jeopardy clause of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " (Pet. App. 86a)

STATEMENT OF THE CASE

The lower courts wrongly applied *United States v. Halper*, 490 U.S. 435 (1989) to an assessment under the Montana tax. *Halper* is a very unique, fact bound decision.[1] As the facts of this case show, *Halper* has no application here.

[1] Justice Kennedy, in a concurring opinion in *Halper*, stated the decision "is grounded in the nature of the sanction and the facts of the particular case". 490 U.S. at 504.

A. Overview of the Taxpayers' Marijuana Business.

In October 1987 Richard M. Kurth, Judith Kurth, Douglas M. Kurth, Rhonda I. Kurth, Clayton H. Halley, and Cindy Halley (the "Taxpayers"), operated a large marijuana growing business on their two wheat/cattle ranches (totalling about 3,500 acres) in Chouteau County, Montana, about 30 miles east of Great Falls, Montana.

The Taxpayers started growing marijuana about December 1985. They planned to pay off over two million dollars in mortgages on the ranches in a short time with the profits from growing marijuana. (Tr. Ex. 4 at 4) The ranches had a sophisticated marijuana factory designed to net over a million dollars each year. (Tr. at 93) They grew marijuana in a large metal building about 40 feet by 120 feet and in several other smaller buildings and attics. They dried the marijuana in a separate house trailer. It was a "cloning" factory with a continuous production line. (Tr. Ex. DD)[2]

[2] "Cloning" is a technique used to produce superior marijuana plants and insures that the resulting marijuana will have a uniform superior quality. A complete description of the cloning process is in the article, "Secrets of The High-Tech Growers Revealed", September 1987 issue of *High Times* magazine. (Tr. Ex. AA3 at 57.) The growing of marijuana is a major industry in the United States. *High Times* magazine is a monthly magazine devoted to this industry. That magazine contains articles on how to cultivate and use marijuana and advertisements for equipment. It also has a survey of the price paid for drugs in a column called "Trans-High Market Quotations." This column regularly publishes prices from around the country for marijuana, LSD, hashish, etc. which reflected the market price for

The Taxpayers harvested and sold five to ten pounds of marijuana every seven to ten days. The Taxpayers grew some of the best marijuana in Montana. (Tr. at 220-221) During the time they grew marijuana, the Taxpayers demanded an increasingly higher price from their purchasers. When arrested they received $1,800 per pound. Their final purchaser was paying $2,000 per pound to other growers for similar marijuana bud.[3] (Tr. at 93)

At a selling price of $1,800 to $2,000 per pound for marijuana bud at wholesale, the Taxpayers were nearly meeting their goal of paying off the mortgage. To net a $1 million per year required the production of about 550 pounds of marijuana bud each year or about 10 pounds each week. (Tr. at 93)

B. The Criminal Proceedings.

The criminal charges were filed against the Taxpayers in the Montana Twelfth Judicial District Court, Chouteau County on October 23, 1987. The Taxpayers made a series

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marijuana. (Tr. at 219.) This column shows that the price for marijuana varies with the quality, that is, the potency (how quickly it gets the user high) and the smokability (how easy it is to smoke).

[3] Like most commodities the wholesale price (price per pound) for marijuana is less per unit than the retail price (price per 1/4 ounce). An analysis of the mark-up shown in the prices in the "Trans-High Market Quotations" shows the per ounce price for marijuana when sold in ounce quantities was between 130% to 190% of the per ounce price when the marijuana is sold in pound quantities. This would give the Taxpayers' marijuana bud a retail price per ounce of $145 to $210 per ounce.

of plea agreements (Tr. Exh. A3, B2, C2, D2, E2, and F2) on March 25, 1988. They were sentenced on July 18, 1988.

Richard J. Kurth, the father, pled guilty to four felony charges.[4] The Montana District Court sentenced Richard Kurth to 20 years on Counts I, II, and III with 15 years suspended. He was sentenced to 5 years on Count IV. The sentences ran concurrently.[5] (Tr. Ex. 4, at 4-5)

Judith Kurth, Douglas M. Kurth, Rhonda I. Kurth, Clayton H. Halley, and Cindy Halley pled guilty to

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[4] The counts were:

Count I: Criminal sale of dangerous drugs, marijuana, in violation of Montana Law, section 45-9-101, MCA;

Count II: criminal possession of a dangerous drug, marijuana, with intent to sell, in violation of Montana Law, section 45-9-103, MCA;

Count III: solicitation to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, in violation of Montana Law, section 45-4-101; and,

Count IV: criminal possession of a dangerous drug, hashish, with intent to sell, in violation of Montana Law, section 45-9-103, MCA.

Tr. Ex. 4 at 1.

[5] On September 5, 1989, the Montana District Court sentenced him to serve an additional 5 years of the suspended sentence in prison because he lied during a subsequent trial of other parties. Trial Exhibit A-6.

conspiracy to possess with intent to sell.[6] Judith Kurth received a sentence of five years with four years suspended. (Tr. Ex. 5, at 4-5) Douglas Kurth received a twenty year suspended sentence. (Tr. Ex. 8) Rhonda Kurth received a three year deferred sentence. (Tr. Ex. 9) Clay Halley received a ten year suspended sentence. (Tr. Ex. 11) Cindy Halley received a three year deferred sentence. (Tr. Ex. 13)[7]

C. The Forfeiture.

Contemporaneous with the criminal proceedings, the Chouteau County Attorney filed a forfeiture action. The forfeiture action was resolved on March 25, 1988, at the same time as the criminal proceedings were resolved, when the Taxpayers signed a settlement agreement. (Brf.

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[6] They pled guilty to:

> Count I: Conspiracy to commit the offense of criminal possession of dangerous drug, marijuana, with intent to sell, a felony, in violation of Section 45-4-102, MCA, as charged in the information.

Tr. Ex. B2, C2, D2, E2, and F2, at 1. Since these Taxpayers were convicted only of conspiracy, double jeopardy was applied by the lower federal courts without all the Taxpayers being subject to all the elements of double jeopardy. The Court has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." *Garrett v. United States*, 471 U.S. 773 (1985). For example, there is no double jeopardy prohibition where a defendant is prosecuted for a conspiracy offense and then later prosecuted in a second proceeding for the underlying substantive offense. See *United States v. Felix*, 112 S. Ct. 1377 (1992).

[7] The Taxpayers also paid a $20 surcharge for each felony pursuant to Mont. Code Ann. § 46-18-236, 1987.

App. 26) The total value of the property that the Taxpayers agreed to forfeit was $18,016.83 in cash and growing equipment which was sold by the sheriff for $400. (Brf. App. 11)

D. The Tax Assessments.

The tax assessment was divided by the Bankruptcy Court into three distinct tax assessments under the Montana Tax: 1) an assessment for harvested marijuana; 2) an assessment for live marijuana plants; and 3) an assessment for the hash or marijuana oil. (Pet. App. 37a-51a)

The assessment on the harvested marijuana was $181,100 for 1,811 ounces of marijuana. (Pet. App. 40a) At the time of arrest there was over 130 ounces of marijuana bud in plastic bags[8] (Tr. Ex. W; Tr. at 248) and about 78 ounces of loose marijuana bud. The Taxpayers also had a total of 100 pounds (1600 ounces) of marijuana stems and leaves in a large cardboard box. (Tr. Ex. DD; Tr. at 243)[9]

The tax on marijuana is 10% of the market value or $100 an ounce whichever is greater. The harvested

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[8] Apparently, these buds were ready for sale since the Taxpayers generally sold five to ten pounds of bud each seven to ten days. They sold the bud in 1/4 pound clear plastic bags.

[9] Stems and leaves of the type and quality of that seized at the Taxpayers' ranch was being sold in the Chouteau County area. (Tr. at 253-254) The marijuana eradication office for Montana testified that stems and leaves of the quality seized at the ranch were being sold and smoked in Montana. He placed a minimum wholesale value of $200 per pound on the stems and leaves and a retail value of $250 to $500 per pound. (Tr. at 131-132)

marijuana was assessed at $100 an ounce because the Taxpayers sold the marijuana for about $2,000 a pound and the highest retail market for marijuana in 1/4 ounce bags was about $400 an ounce. (Tr. Exh. AA4, at 26-27)

The tax assessment on the live marijuana plants included over two thousand marijuana plants varying in size from new cuttings several inches high to large "mother" plants several feet tall. (Tr. Exh. DD at 14-17) The Department made a tax assessment on the marijuana plants of $213,345 based on an estimated market value for marijuana plants. The Department also made an $224,000 tax assessment on marijuana oil.[10]

The Department first assessed the Taxpayers on December 8, 1987. (Tr. Ex. 19) A revised assessment was issued May 7, 1988. (Tr. Ex. 20) The Taxpayers timely filed a protest to these assessments and administrative proceedings began before the Department of Revenue to resolve the dispute. The Department appointed a hearing officer and both sides started discovery under the Montana Administrative Procedure Act, Mont. Code Ann. §§ 2-4-601, et seq.

F. The Bankruptcy Proceedings.

On September 8, 1988, the Taxpayers filed for bankruptcy in the United States Bankruptcy Court for the District of Montana, Great Falls Division, Cause No. 88-40629. The Department of Revenue filed a Proof of

[10] Marijuana oil is produced by heating marijuana in an organic solvent like alcohol and boiling down this solvent. It is put on regular cigarettes and smoked.

Claim on November 14, 1988, for $908,078.14 which included interest to date of filing.[11] On November 16, 1988, the Department filed a Motion for Relief from the Automatic Stay. The Bankruptcy Court denied the motion on January 31, 1989.

On February 14, 1989, the Department filed an Amended Proof of Claim. The Taxpayers filed a Combined Objection to Proof of Claim and Complaint to Determine Dischargeability of Indebtedness and for Declaratory and Injunctive Relief on May 2, 1989. This complaint created the adversary proceedings that are now before the Court.

An initial prehearing order was issued on May 22, 1989, in the adversary proceeding. The Department answered the complaint June 9, 1989. Following discovery and prehearing motions, a trial was held on March 27 and 28, 1990. After the submission of posthearing briefs, the Bankruptcy Court issued an Order and Judgement dated May 8, 1990. (Pet. App. 24a)

The Bankruptcy Court granted the Taxpayers' objection to the Department's claim for $864,940.99 pursuant to the Montana Tax and denied the Proof of Claim for that tax. The Bankruptcy Court held the assessments on the live marijuana plants and the marijuana oil were improper under Montana law. (Pet. App. 41a-48a and 60a) The Department did not appeal those two portions of that Order. Those two assessments are not before the Court.

[11] This proof of claim included a claim for $43,137.15 unpaid inheritance tax. That unpaid inheritance tax portion of the claim was not contested and is not a part of this case.

The Bankruptcy Court also held the assessment on the 1,811 ounces of harvested marijuana was proper according to Montana law and found a tax liability of $181,100. (Pet. 49-51a, App. 58a and 60a)[12] However, it ruled that the tax assessment on the harvested marijuana "constitutes double jeopardy to the Taxpayers, prohibited by the Fifth Amendment to the U. S. Constitution, pursuant to *U.S. v. Halper* . . . " (Pet. App, 60a)[13] The

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[12] The $208,150 cited in the decisions includes interest up to the date of the filing of the Department's proof of claim on the assessment of the 1,811 ounces of marijuana.

[13] The Bankruptcy Court rejected the Taxpayers remaining constitutional arguments:

> I reject Plaintiffs' alternative constitutional arguments dealing with excessive fines under the Eighth Amendment because the tax is not a fine in a criminal proceeding, *U.S. v. Sanchez*, 340 U.S. 42, 45 (1950), nor does it offend the due process or equal protection clauses in this tax case. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1980) (due process is not offended if the party contesting the tax is afforded an opportunity to challenge the tax before conclusive judgment); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (State may impose different specific taxes upon different trades and professions and vary the rates). All drug dealers are treated equally under the Drug Tax Act, and such is a reasonable classification. Further, there is no unconstitutional delegation of the legislative powers to the D.O.R. to make a determination of market value. *Plum Creek Lumber Co. v. Hutton*, 171 Mont. 168, 557 P.2d 798 (1976). I finally reject Plaintiffs' argument under Article II, § 28 of the Montana Constitution and eminent domain as spurious.

Pet. App. 59-60a. The Taxpayers did not cross-appeal those portions of the Bankruptcy Court's decision.

Department timely appealed the portion of the Order disallowing the tax on the harvested marijuana and timely objected to the Referral of Appeal to Bankruptcy Appellate Panel on May 21, 1990. The case proceeded to the District Court.

Following submission of the record and briefs, the United States District Court affirmed the decision of the Bankruptcy Court in an Order dated April 23, 1991. (Pet. App. 139) The Department timely appealed the District Court decision to the Ninth Circuit Court of Appeals. The Circuit Court affirmed the decisions of the lower courts. (Pet. App. 1a)

SUMMARY OF ARGUMENT

Montana has a tax on marijuana of $100 an ounce. The Taxpayers owe $181,100 in tax because they possessed 1,811 ounces of marijuana. The Taxpayers operated a large marijuana growing business designed to net millions of dollars.

The double jeopardy provision of the Fifth Amendment does not apply to this case which involves a tax, not a civil sanction. The lower courts erred by applying *United States v. Halper*, 490 U.S. 435 (1989) to the tax assessment. In *Halper* the Court held that under the double jeopardy clause "a defendant who already has been punished in a criminal prosecution may not be subject to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-449. However, in *Halper*, the Court announced "a rule for the

rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. Despite this admonition and a contrary decision by the Montana Supreme Court in *Sorenson v. State Dept. of Revenue*, 836 P.2d 29 (Mont. 1992) (Pet. App. 62a), the courts below wrongly applied *Halper* and found the Montana Tax was a civil sanction and the tax assessment violated the double jeopardy clause.

A. In order for the Court's decision in *Halper* to apply to the Montana Tax, the tax must be determined, as a matter of law, to be a penalty or civil sanction. The statute itself and the statement of legislative intent show the Montana Tax is not a civil sanction. It is an excise tax. The Montana legislature simply wanted to raise money when it enacted the tax. In *Sorenson*, the Montana Supreme Court specifically held the Montana tax on drugs was "an excise tax" and "not a multiple punishment and does not violate double jeopardy." *Id.* 836 P.2d at 33. (Pet. App. 73a). Courts of appeal in a half dozen other states have reached the same conclusion about their state's drug tax.

B. Two decisions by the Court, *United States v. Sanchez*, 340 U.S. 42 (1950), and *Minor v. United States*, 396 U.S. 87 (1969), held that a nearly identical federal tax of $100 an ounce on marijuana was a true excise tax and not a penalty. A tax "does not cease to be a valid tax measure . . . because the [taxed] activity is otherwise illegal." *Id.* 396 U.S. at 98. These decisions show that a tax of $100 an ounce on marijuana is not a penalty and is not disproportionate.

C. The Court's decision in *Halper* involved federal statutory penalties which contained no element of proportionality. The statutory penalty was based on what the Court found as "imprecise formulas" which had no relationship to the size of the penalized activity. Because of the lack of statutory formulas the federal penalty could lead to "sanctions overwhelmingly disproportionate to the damages." *Id.* 490 U.S. at 449. In contrast the Montana Tax has a definite statutory rate ($100 per ounce for marijuana) and a precise statutory formula which prevents overwhelmingly disproportionate tax assessments.

The Montana Tax supplied "funds for the youth evaluation program and chemical abuse aftercare programs," and "grants to youth courts to fund chemical abuse assessments and the detention of juvenile offenders in facilities separate from adult jails." Mont. Code Ann. § 15-25-122. This use of the drug tax revenue demonstrates the remedial, non-punitive purpose of the Montana Tax under the standards set by the Court in *United States v. Ward*, 448 U.S. 242 (1980) [hereinafter *Ward*]. In *Sorenson* the Montana Supreme Court also found the "tax has a remedial purpose other than promoting retribution and deterrence." *Id.* 836 P.2d at 31. (Pet. App. 69a)

D. The lower courts erred by subjectively distinguishing between "civil sanction" taxes, e.g., the Montana Tax, and "revenue-raising" taxes. In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), the Court formally abandoned a prior series of decisions which divided taxes into "regulatory taxes" and "revenue-raising taxes." This subjective distinction had created a quagmire of conflicting decisions. To affirm the lower

federal courts' decisions in this case will create new subjective distinctions between "civil sanction taxes" and "revenue-raising taxes" and will lead to the same quagmire the Court faced prior to *Bob Jones University*.

ARGUMENT

A. The Montana Tax on Dangerous Drugs is Not a Civil Sanction.

At issue is the right of the states to tax – a central element of their sovereignty. "Power to tax for State purposes is as much an exclusive power in the State as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 427 (1807).

The principle fault of the decisions of the lower courts is the equation of a tax to a civil sanction. While noting that "[a] state may legitimately tax criminal activities," the court of appeals went on to hold that a tax on criminal activities is a per se civil sanction:

> Where the case does involve a previous criminal conviction, however, special considerations come into play. Here, the most relevant consideration is the character of *the sanction* and whether it may fairly be called punitive in nature.

Kurth, 986 F.2d at 1311 (Pet. App. 9a) (emphasis supplied.) The holding that the Montana Tax was a civil sanction was done without any analysis of the statute

itself, the legislative intent, or the decisions of other courts.

1. The Montana Tax on dangerous drugs is a tax.

"The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The statute imposing the tax, Mont. Code Ann. § 15-25-111 (1987), states:

> **15-25-111. Tax on dangerous drugs.** (1) There is a tax on the possession and storage of dangerous drugs. Except as provided in 15-25-112, each person possessing or storing dangerous drugs is liable for the tax. The tax imposed is determined pursuant to subsection (2). The tax is due and payable on the date of assessment. The department shall add an administration fee of 5% of the tax imposed pursuant to subsection (2) to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process.
>
> (2) With the exception that the tax on possession and storage of less than 1 ounce, 1 gram, or 100 micrograms of dangerous drugs must be that set forth below for 1 ounce, 1 gram, or 100 micrograms, the tax on possession and storage of dangerous drugs is the greater of:
>
> (a) 10% of the assessed market value of the drugs, as determined by the department; or
>
> (b) (i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per gram of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

(3) The tax imposed under this section may be collected before any state or federal fines or forfeitures have been satisfied.

The Montana Tax is administered like other Montana taxes. Indeed, the tax, Mont. Code Ann. §§ 15-25-113, 114, and 115, incorporates by reference provisions from the Montana Individual Income Tax, Mont. Code Ann. §§ 15-30-101, et seq., the Montana Telephone Company

License Tax, Mont. Code Ann. §§ 15-53-101, et seq., and the normal Montana tax collection system.

2. The Montana legislature intended to create a tax.

The Montana "Dangerous Drug Tax Act" was published as 1987 Mont. Laws 563. That act, as passed by the legislature and signed by the Governor, contained a preamble. Under Montana practice, a statutory preamble is not ordinarily codified, but it does express the intent of the Montana legislature. The preamble to the Montana Drug Tax states:

> WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and
>
> WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and
>
> WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.
>
> THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use

> of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anti-crime initiatives without burdening law abiding taxpayers.

These legislative findings are supported by the Court.

> Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous.

United States v. Mendenhall, 446 U.S. 544, 561-562 (1980) (Powell, J., concurring in part and concurring in judgment.)

The motive for the Montana Tax is the same motive for all taxes by all legislatures – to raise money to pay for the costs of running the government. The legislative history of the tax lends further support for this motive. (Brf. App. 29)

The minutes of the committees which handled the bill which became the Montana Tax show that the legislators did not consider the Montana Tax a punishment. The prime sponsor of the tax, Representative Strizich, was directly asked whether the tax was a penalty or civil sanction. He answered:

> When you are talking about a penalty you are talking about a punitive measure and [he] thinks that would be entering a whole new ball game. We want to have the effect of a tax and, therefore, allow the fairness of our tax system to enter into this.

Montana Senate Taxation Committee Minutes, March 25, 1987. (Brf. App. 36) This intent is shown in other portions of the minutes. For example,

> Michael Murry told the Committee he represented 32 chemical dependent treatment centers in the state, and said revenue from such a tax would help in funding these programs.

Montana House Taxation Committee Minutes, March 5, 1987. (Brf. App. 29)

3. The Montana Supreme Court held the tax was not a sanction.

In *Sorenson* the Montana Supreme Court held that "the Montana Dangerous Drug Tax is an excise tax based on the quantity of drugs in the taxpayer's possession" *Id.* 836 P.2d at 33. (Pet. App. 72a) and "is not derived from a criminal conviction." *Id.* 836 P.2d at 32 (Pet. App. 71a) Finally, the Montana Supreme Court specifically held: "we hold Montana's Dangerous Drug Tax is not a multiple punishment and does not violate double jeopardy." *Id.* 836 P.2d at 33. (Pet. App. 73a)

Courts of appeal in other states have come to the same conclusion as the Montana Supreme Court and found their state taxes on drugs were taxes, not civil sanctions, and did not violate double jeopardy. *See, e.g., State v. Gallup*, 500 N.W.2d 437 (Iowa 1993); *Rehg v. Ill.*

Dept. of Revenue, 605 N.E.2d 525 (Ill. 1992); *State v. Riley*, 479 N.W.2d 234 (Wis. 1991); *Jackson v. Sharp*, 846 S.W.2d 144 (Tex. App. 1993).

B. Taxes on Illegal Items or Activities Are Not Sanctions – the Court's and Lower Federal Court Decisions on a Federal Tax on Marijuana Held It Was a Legitimate Tax.

Taxes on marijuana have been before this Court before.[14] In *United States v. Sanchez*, 340 U.S. 42, 45 (1950), the Court held that a similar federal tax of $100 per ounce on marijuana was a true tax and not a penalty: **"The tax in question [of $100 per ounce of marijuana] is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect. . . ."** (The Marijuana Tax Act was last codified as 26 U.S.C. § 4741 et seq. (1954); it was repealed in 1971).

The history of *Sanchez*, the *Sanchez* decision itself, and subsequent federal court decisions show that *Sanchez*

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[14] In 1950 the federal marijuana tax was codified as I.R.C. § 2590 (1946):

> (a) Rate – There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:
>
> (1) Transfers to special taxpayers – Upon each transfer to person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof.
>
> (2) Transfers to others – Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, **$100 per ounce of marihuana or fraction thereof** . . .

overruled *Tovar v. Jareckie*, 173 F.2d 449 (7th Cir. 1949) which held the marijuana tax was a "penal statute."[15] See *Lassoff v. Gray*, 168 F. Supp. 363 (W.D. Ky., 1958) which recognized that *Sanchez* overruled *Tovar*.

The history of *Sanchez* is set out in the briefs filed by the United States Solicitor General in that case. The briefs demonstrate that the question of whether a tax of $100 per ounce on marijuana was a penalty or a tax was critical to the Court's *Sanchez* decision.[16]

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[15] The Seventh Circuit decision in *Tovar*, 173 F.2d at 451, mirrored the reasoning of the lower federal courts in this case: "We hold that *this section* of the statute under which this plaintiff was assessed *is a penal statute and not a tax statute.*" (emphasis supplied.)

[16] The statement of the case was:

> At the opening of the trial on March 28, 1950, appellees, relying on *Tovar v. Jarecki*, 173 F.2d 449, in which the Court of Appeals for the Seventh Circuit had held Section 2590(a)(2) to be **"a penal and not a revenue-raising statute * * * a penalty inflicted without a hearing and not a tax", moved to dismiss the complaint** (R. 6). The district court, apparently regarding the *Tovar* case as an authoritative holding that Section 2590(a)(2) is unconstitutional, granted the motion (R. 6), and an order was entered dismissing the complaint. (R.3.).

Brief of the United States at 2-3 (emphasis supplied).

The federal Marijuana Tax Act was before the Court a number of times after *Sanchez*. Although these cases involved the criminal sanctions in the federal Marijuana Tax Act, the Court's decisions affirmed the validity of the tax provisions in the law. For example, in *Buie v. United States*, decided with *Minor v. United States*, 396 U.S. 87 (1969), which involved the federal tax on marijuana, the Court stated:

> The dissent suggests that the courts should refuse to enforce § 4705(a) as part of a revenue measure . . . *A statute does not cease to be a valid tax measure* because it deters the activity taxed, because the revenue obtained is negligible, or *because the activity is otherwise illegal.*

Minor, 396 U.S. at 98 (emphasis added). The Court again upheld the validity of a $100 per ounce marijuana tax.

The federal marijuana tax was repealed effective May 1, 1971. The repealing statute, Pub. L. No. 91-513, 84 Stat. 1292, and the general savings statute found in 1 U.S.C. § 108, saved existing tax liabilities and liens under the Marijuana Tax Act. A number of taxpayers challenged outstanding assessments and liens under the Marijuana Tax Act as unconstitutional. The federal court decisions as a result of these challenges further emphasized that the federal tax of $100 per ounce on marijuana was a true tax and not a penalty.

For example, the marijuana tax was upheld in *Simmons v. United States*, 476 F.2d 715 (10th Cir. 1973).[17] In

[17] In that case the government sought to foreclose its tax lien for an unsatisfied marijuana excise tax assessment of **$483,200**. The trial court ruled for the federal government and against the taxpayer and his wife. Before judgment was entered the taxpayer died. Judgment was entered against the taxpayer's estate for marijuana tax and other liabilities totaling **$567,393.58**.

upholding the constitutionality of the marijuana excise tax, the Fifth Circuit held that the federal tax of $100 per ounce on marijuana was a valid civil excise tax. It stated:

> The *Sanchez* case was a suit for recovery of the $100 tax under the antecedent statute, § 7(a)(2) of the earlier Marihuana Tax Act, 50 Stat. 551. Collection was resisted on the ground that the statute levied an unconstitutional penalty and not a tax. **The Court held that imposition of the heavy liability was a legitimate exercise of the taxing power, despite its collateral regulatory purpose and effect and its severity as opposed to the $1 tax rate on transfers to registered persons. . . .**
>
> **Therefore, we conclude that the rationale of *Sanchez* is unimpaired and still sustains the tax as a valid civil liability. . . .**

Simmons, at 717-719.[18]

The Court should not impose on the states, through the Fourteenth Amendment, higher constitutional standards than those imposed on the federal government by

[18] Also, see the following cases which upheld the $100 an ounce marijuana tax and held it was not a penalty: *Frey v. United States*, 558 F.2d 270 (5th Cir. 1977); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1973); *Cancino v. United States*, 451 F.2d 1028, 196 Ct. Cl. 568, (1971) *cert. denied*, 408 U.S. 925, 92 S. Ct. 2504, 33 L. Ed. 2d 337 (1972); *Widdis v. United States*, 395 F. Supp. 1015 (1974).

the Bill of Rights. *Benton v. Maryland*, 395 U.S. 784 (1969). If a federal tax of $100 an ounce on marijuana is not a penalty, then a state tax of $100 an ounce on marijuana is not a penalty.

Federal excise taxes on unlawful activities or items are still quite common. For example, the National Firearms Act, 26 U.S.C. § 5801 et seq. (NFA) taxes the manufacture and transfer of certain firearms and destructive devices. In addition to the NFA's taxation and regulatory provisions, 18 U.S.C. § 922 prohibits certain persons from transferring or possessing certain types of firearms including firearms taxed under the NFA.

C. *Halper* Is Neither Applicable Nor Controlling

1. *Halper* involved fixed statutory penalty – Montana's drug tax is not a fixed statutory penalty.

In *Halper* the federal law in question, 31 U.S.C. §§ 3729-3731, (the False Claims Act) expressly provided a "*civil penalty* of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action" for each false claim. (emphasis added) There was no question that the law was a civil penalty.

The False Claim Act is violated by anyone who is not a member of the armed services of the United States and who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." 31 U.S.C. § 3729. The $2,000

penalty per claim is in addition to an award of twice the amount of actual damages suffered by the federal government. There was no relationship between the amount of the penalty and Halper's activities.

In *Halper*, the federal government asked for a civil "penalty" of $130,000 under the False Claims Act in addition to the criminal penalties. As the federal district court stated:

> The Government seeks to recover $130,000, representing the $2,000 allotted by the statute for each of the 65 false claims set forth in the complaint. At most, however, the amount by which the 65 claims were inflated was $9.00 for each claim, or $585.

Halper, 660 F. Supp. at 533. The "penalty" of $130,000 was 222.22 times the maximum total amount of the false claims.

Those were the facts behind the Court's statement that the *Halper* decision established "a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

Under the False Claims Act, if the government could not prove other damages, a person who made a single false claim for $1 million would receive the same $2,000 civil penalty as the false claim for $9.00 made by Halper. The False Claims Act does not contain any element of rough proportionality. The formula for the penalty was extremely imprecise.

In contrast to the False Claim Act involved in *Halper*, the Montana Tax is a straight forward excise tax. As with other excise taxes the assessment is determined by the type and quantity of the tax item possessed. The more of the taxed item possessed the higher the tax. It is not a "fixed-penalty" based upon the mere possession. The Montana Tax has a precise formula for the assessment. The person who possesses one ounce of marijuana pays a tax of 10% of the market value of the marijuana or $100 whichever is more. These Taxpayers owe $181,100 in taxes because they possessed 1,811 ounces of marijuana.

The Court's recent decision in *Austin v. United States*, 113 S. Ct. 2801 (1993) and *Alexander v. United States*, 113 S. Ct. 2766 (1993) further explained the *Halper* decision. However, the holdings in those cases do not apply to this case. In those cases the Court held that statutory forfeitures were fines under the provision of the Eighth Amendment forbidding excessive fines. This case does not involve the excessive fines issue.

A general review of the facts of those cases shows that the equitable basis for those decisions also does not apply to this case. Because Austin pled guilty in state court to one count of possession of cocaine [two grams] with intent to distribute, the federal government wanted the forfeiture of Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988). That property, which was worth about $40,000, was almost all of the property he had. (Austin's Brief at 4-5)

The Court decided *Alexander* on the same day as *Austin*. In that case Alexander was convicted of 17 obscenity counts and 3 counts of violating RICO. 18

U.S.C. § 1961 "As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three videotapes were obscene." *Id.* 119 S. Ct. at 2770. For this offense the United States Government sought the forfeiture of Alexander's wholesale and retail adult entertainment businesses and about $9 million.

The fault with the statutory penalties and forfeitures in *Halper*, *Austin*, and *Alexander* lay in what the Court called the "imprecise formulas" of the statutes. As written they were not tied in some manner to the size of the criminal activity. The lack of legislative guidelines lead to the possibility of constitutionally disproportionate punishment or double punishment.

2. Unlike the penalty in *Halper*, the Montana Drug Tax is not disproportionate.

There is no authority that a tax must be proportional just as there is no authority, apart from lower court decisions in this case, that a tax is a civil sanction. Despite this lack of authority the court of appeals required Montana to show proportionality. "The record in this case, however, is devoid of information necessary to make a determination of proportionality." *Kurth*, 986 F.2d at 1312. (Pet. App. 10a) The court of appeals required Montana to offer "evidence justifying its imposition of the tax." *Id.* 986 F.2d at 1312. (Pet. App. 11a) The decision ignores the express language of the Montana Tax which makes the tax proportional.

The Montana Tax has an expressed tax rate for the possession of drugs. In this case the rate is $100 per ounce

of marijuana. The Montana Drug Tax has an expressed statutory proportionality.

The Montana Supreme Court in *Sorenson*[19] found the Montana Tax was not grossly disproportionate:

> Finally, respondents contend the tax was excessive. Sorenson was assessed a tax of $200 per gram, or $4,216 for his possession of 21.08 grams of cocaine. Similarly, Williams was assessed a tax of $100 per ounce, or $1,260 for his possession of 12.6 ounces of marijuana. We do not conclude that this tax is excessive. It is neither a fixed penalty as in *Halper*, nor is the amount of tax so grossly disproportionate as to transform this tax into a criminal penalty which violates double jeopardy. We also note the rates of tax on various drugs are comparable to those of other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act which has now been repealed.

Id. 836 P.2d at 33.

For example, under the Montana Tax cocaine is taxed at $200 per gram. Mont. Code Ann. § 15-25-111(2)(iii) (1987). In Montana a person such as Austin who had two grams of cocaine would be assessed a total drug tax of $400. A tax of $400 is far, far smaller than the forfeiture of a mobile home and auto body shop worth about $40,000.

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[19] *Sorenson* combined two separate appeals: *Sorenson v. State, Department of Revenue* and *Department of Revenue v. Williams*.

Most of the 27 states that tax drugs, tax marijuana at $100 an ounce. This tax rate probably came from the $100 an ounce tax in the federal tax which was upheld by the Court in 1950 in *Sanchez*. A tax of $100 an ounce in 1950 dollars would equal a tax of $472 in 1987 dollars.[20] Therefore, the Montana tax on marijuana is about one-fifth the rate of the federal tax on marijuana which was approved by federal courts.

The fact that the Montana Drug Tax might deter the taxed activity does not effect the validity of the tax. In *Alaska Fish Co. v. Smith*, 235 U.S. 44 (1921) an excise tax designed to stop the use of herring for fish oil, fertilizer, and fish meal was sustained. The Court held:

> Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk . . . We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation.

Id. 235 U.S. at 48-49.

3. The Montana Drug Tax is remedial.

Even if the Court were to subject the Montana Tax to stricter scrutiny than that given taxes on legal activity, the tax assessment would be valid. One of the tests used in determining if a "sanction" violates the double jeopardy clause, is whether "the second sanction may not fairly be

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[20] *Statistical Abstract of the United States*, 110 Ed., U.S. Department of Commerce, Bureau of the Census, p. 467.

characterized as remedial, but *only* as a deterrent or retribution." *Halper* at 502 (emphasis added). The Montana Tax passes this test.

Like many excise taxes, the Montana Tax provides how Montana will spend the revenue from the tax.[21] The 1987 law, Mont. Code Ann. § 15-25-122, provided:

> **Disposition of proceeds.** (1) The department shall transfer all taxes collected pursuant to this chapter, less the administration fee authorized in 15-25-111(1), to the state treasurer on a monthly basis.
>
> (2) The state treasurer shall deposit one-third of the tax to the credit of the department of family services to be used for the youth evaluation program and chemical abuse aftercare programs.
>
> (3) The treasurer shall credit the remaining two-thirds of the tax proceeds as follows:
>
> (a) 85% to the department of justice to be used for grants to youth courts to fund chemical abuse assessments and the detention of juvenile offenders in facilities separate from adult jails; and
>
> (b) 15% to the special law enforcement assistance account created in 44-13-101 for the activities described in 44-13-103.

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[21] There of course is no need for a tax to be remedial. The Court has repeatedly held:

> [T]here is no requirement . . . the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. . . . A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981).

In *Sorenson* the Montana Supreme Court found the Montana Tax had a remedial purpose:

> Next, the tax has a remedial purpose other than promoting retribution and deterrence. Section 15-25-122, MCA, earmarks the use to the tax funds collected to defray the costs of drug abuse. The tax collected is used for such things as youth evaluations, chemical aftercare, chemical abuse assessments and juvenile detention facilities. The tax collected is based on the quantity of drugs possessed or stored by the taxpayer, and is not excessive in relation to the remedial purposes addressed in § 15-25-122, MCA.

Id. 836 P.2d at 31. (Pet. App. 69a).

The Montana Drug Tax was designed to pay for only a very small part of the costs of drugs, including marijuana, to society. "Possession use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.' " *Harmelin v. Michigan*, 115 L. Ed. 2d 836, 870 (1991) (Kennedy, J., concurring.) (Quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 688 (1989)).

What is "remedial" was clarified by the Court in *United States v. Ward*, 448 U.S. 242 (1980). That case involved penalties under the Federal Water Pollution

Control Act (FWPCA). 33 U.S.C. § 1251. The Court held that a federal fine of up to $250,000 per offense imposed for failure to notify officials of an oil spill was a civil sanction, not a criminal penalty, and did not violate the double jeopardy provision of the Constitution. The fine was in addition to payment for the costs of cleanup. The Court indicated that laws designed to compensate for "damages sustained by society" were remedial. *Ward*, 448 U.S. at 254. *Halper* did not overrule *Ward*.

The Montana Tax funds "youth evaluation programs and chemical abuse aftercare programs," "grants to youth courts to fund chemical abuse assessments and detention of juvenile offenders in facilities separate from adult jails," and "the special law enforcement assistance account." Mont. Code Ann. § 15-25-122 (1987). It has solely a "nonpunitive purpose" within the meaning of *Halper*. Having solely a nonpunitive purpose the Montana Tax is not a sanction.

D. Subjectively Dividing Taxes into "Civil Sanction Taxes" and "Revenue Raising Taxes" Would Create a Quagmire.

In the 1920's to avoid the restrictions of the Anti-Injunction Act, the Court divided taxes into two classes: "revenue-raising taxes" which were subject to the Anti-Injunction Act; and "regulatory taxes" which were not subject to the Anti-Injunction Act. See *Hill v. Wallace*, 259 U.S. 44 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *United States v. Constantine*, 296 U.S. 287 (1925); *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922). Using this distinction the Court avoided the restrictions of the Anti-Injunction Act

and struck down a number of "regulatory taxes." The history of this distinction was set out by the Court in the *Bob Jones University* case.

The inherent problems created by the distinction between regulatory and revenue-raising taxes was apparent from the beginning and prompted vigorous dissents and contradictory decisions. Compare *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932) with *Sonzinsky v. United States*, 300 U.S. 506 (1937). Finally, in *Bob Jones University* the Court expressly held: "the Court has also *abandoned* the view that bright-line distinctions exist between regulatory and revenue-raising taxes." *Id.* 416 U.S. at 743 n.17 (emphasis added). Indeed, the Court emphasized that point in *Bob Jones University* by stating it twice:

> In support of its argument that this case does not involve a "tax" within the meaning of § 7421(a) [the Anti-Injunction Act], petitioner cites such cases as *Hill v. Wallace*, 259 U.S. 44 (1922) (tax on unregulated sales of commodities futures), and *Lipke v. Lederer*, 259 U.S. 557 (1922) (tax on unlawful sales of liquor. It is true that the Court in those cases drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. *E.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

Id. 416 U.S. at 743 n.12.

If the Court adopts the distinction created by the lower federal courts in this case between "sanction taxes" and "revenue-raising taxes", it will reopen the door closed by its decision in *Bob Jones University* and recreate the quagmire.

The philosophical basis for taxing illegal activity was set forth in Justice Cardozo's dissenting opinion, joined by Justice Brandeis and Justice Stone, in *United States v. Constantine*, 296 U.S. 287, 297-298 (1925):

> Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but payment commensurate with the gains is thus the animating motive. * * * Congress may also have believed that the furtive character of the business would increase the difficulty and expense of the process of tax collection. The Treasury should have reimbursement for this drain on its resources. Apart from either of these beliefs, Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.

Thus viewed, the statute was not adopted to supplement or sanction the police powers of the states or their subdivisions. It was adopted, for

anything disclosed upon its face or otherwise, as an appropriate instrument of the fiscal policy of the nation. The business of trading in things contraband is not the same as the business of trading in legitimate articles of commerce. Classification by Congress according to the nature of the calling affected by a tax (*State Board of Tax Commissioners v. Jackson*, 283 U.S. 527) does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state * * * By classifying in such a mode Congress is not punishing for a crime against another government. It is not punishing at all. It is laying an excise upon a business conducted in a particular way with notice to the taxpayer that if he embarks upon that business he will be subjected to a special burden. What he pays, if he chooses to go on, is a tax and not a penalty.

The general constitutional limits the Court has placed on state taxation are sufficient to protect Taxpayers from abuse of a constitutional nature by state taxes. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Com. of Webster County*, 109 S. Ct. 633 (1989). So long as the Montana Tax does not violate the normal constitutional limits, the Court should not affirm the lower courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL VAN TRICHT*
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November 1993

CHAPTER NO. 563

[HB 791]

AN ACT ESTABLISHING A TAX ON THE POSSESSION AND STORAGE OF DANGEROUS DRUGS; PROVIDING FOR THE ASSESSMENT AND COLLECTION OF THE TAX; GRANTING RULEMAKING AUTHORITY TO THE DEPARTMENT OF REVENUE; PROVIDING FOR FUNDING OF THE ADMINISTRATION OF THE TAX; STATUTORILY APPROPRIATING THE ADMINISTRATIVE FUNDING; PROVIDING FOR DISPOSITION OF THE TAX COLLECTED; AND AMENDING SECTION 17-7-502, MCA.

WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and

WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and

WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.

THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who

profit from drug-related offenses and to dispose of the tax proceeds through providing additional anticrime initiatives without burdening law abiding taxpayers.

Be it enacted by the Legislature of the State of Montana:

Section 1. **Short title**. This act may be cited as the "Dangerous Drug Tax Act".

Section 2. **Definitions**. As used in [this act], unless the context requires otherwise, the following definitions apply:

(1) "Dangerous drug" has the meaning provided in 50-32-101.

(2) "Department" means the department of revenue provided for in 2-15-1301.

(3) "Person" means an individual, firm, association, corporation, partnership, or any other group or combination acting as a unit.

Section 3. **Tax on dangerous drugs**. (1) There is a tax on the possession and storage of dangerous drugs. Except as provided in [section 4], each person possessing or storing dangerous drugs is liable for the tax. The tax imposed is determined pursuant to subsection (2). The tax is due and payable on the date of assessment. The department shall add an administration fee of 5% of the tax imposed pursuant to subsection (2) to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process.

(2) The tax on possession and storage of dangerous drugs is the greater of:

(a) 10% of the assessed market value of the drugs, as determined by the department; or

(b) (i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per gram of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

(3) The tax imposed pursuant to this section must be collected only after any state or federal fines or forfeitures have been satisfied.

Section 4. **Exemptions**. The tax imposed pursuant to [section 3] does not apply to any person authorized by state or federal law to possess or store dangerous drugs. The burden of proof of an exemption from [section 3] is on the person claiming it.

Section 5. **Administration and enforcement – department rules.** (1) All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such other information which the department may require, in a manner and on a form prescribed by the department.

(2) The deficiency assessment provisions of 15-53-105, the civil penalty and interest provisions of 15-53-111, the criminal penalty provisions of 15-30-321(3), the estimation of tax provisions of 15-53-112, and the statute of limitations provisions of 15-53-115 apply to this tax and are fully incorporated by reference in this chapter. The department may adopt such rules as are necessary to administer and enforce the tax.

Section 6. **Tax appeal**. A person aggrieved by an assessment pursuant to [section 3] or an exemption decision pursuant to [section 4] may appeal the assessment or exemption decision pursuant to Title 15, chapter 2, part 3.

Section 7. **Warrant for distraint**. If all or part of the tax imposed by this chapter is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded.

Section 8. **Accounts**. (1) There is an institutions evaluation special revenue account within the state treasury. One-half of the taxes collected under [section 9] shall be deposited in the account.

(2) There is a chemical abuse assessment special revenue account within the state treasury. One-half of the taxes collected under [section 9] shall be deposited in the account.

Section 9. **Disposition of proceeds**. (1) The department shall transfer all taxes collected pursuant to [this act], less the administrative fee authorized in [section 3(1)], to the state treasurer on a monthly basis.

(2) The state treasurer shall deposit one-half of the tax to the credit of the department of institutions to be used for the youth evaluation program and chemical abuse aftercare programs.

(3) The treasurer shall credit the remaining one-half of the tax proceeds as follows:

(a) 85% to the department of justice to be used for grants to youth courts to fund chemical abuse assessments and the detention of juvenile offenders in facilities separate from adult jails; and

(b) 15% to the special law enforcement assistance account created in 44-13-101 for the activities described in 44-13-103.

Section 10. **Special revenue account**. (1) There is created a special revenue fund to be called the dangerous drug tax administration fund.

(2) All administrative fees collected under [section 3(1)] shall be deposited by the department into the dangerous drug tax administration fund.

(3) The money in the dangerous drug tax administration fund may be expended by the department to administer the tax and pay any refund required by this chapter.

(4) The appropriation made in subsection (3) is a statutory appropriation as provided in 17-7-502.

Section 11. Section 17-7-502, MCA, is amended to read:

"**17-7-502. Statutory appropriations – definition – requisites for validity**. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations:

(a) 2-9-202;
(b) 2-17-105;

(c) 2-18-812;
(d) 10-3-203;
(e) 10-3-312;
(f) 10-3-314;
(g) 10-4-301;
(h) 13-37-304;
(i) 15-31-702;
(j) 15-36-112;
(k) 15-70-101;
(l) 16-1-404;
(m) 16-1-410;
(n) 16-1-411;
(o) 17-3-212;
(p) 17-5-404;
(q) 17-5-424;
(r) 17-5-804;
(s) 19-8-504;
(t) 19-9-702;
(u) 19-9-1007;
(v) 19-10-205;
(w) 19-10-305;
(x) 19-10-506;
(y) 19-11-512;
(z) 19-11-513;
(aa) 19-11-606;
(bb) 19-12-301;
(cc) 19-13-604;
(dd) 20-6-406;
(ee) 20-8-111;
(ff) 23-5-612;
(gg) 37-51-501;
(hh) 53-24-206;

(ii) 75-1-1101;
(jj) 75-7-305;
(kk) 80-2-103;
(ll) 80-2-228;
(mm) 90-3-301;
(nn) 90-3-302;
(oo) 90-15-103;
(pp) Sec. 13, HB 861, L. 1985; *and*
(qq) [section 10].

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for such payments."

Section 12. **Codification instruction**. Sections 1 through 10 are intended to be codified as an integral part of Title 15, and the provisions of Title 15 apply to sections 1 through 10.

Approved April 20, 1987.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; and CLAYTON H. and CINDY K. HALLEY, husband and wife; Debtors. ROBERT G. DRUMMOND, Trustee; Plaintiff, - vs - COUNTY OF CHOUTEAU, a political subdivision of the State of Montana, Defendants.	Case No. 88-40629-JLP-11 ADVERSARY PROCEEDING No. 90/00245

* * *

ORDER

* * *

At Butte in said District on this 6th day of February, 1991,

Upon Motion of the Montana Department of Revenue, and good cause having been shown,

IT IS HEREBY ORDERED that the Montana Department of Revenue, shall transfer $17,297.66 in funds confiscated from the debtors' account with Dain Bosworth on January 20, 1988, to Chouteau County, Montana, as per this Court's Order in this proceeding dated January 4, 1991.

JOHN L. PETERSON
JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, Montana 59703

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re KURTH RANCH, KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; and CLAYTON H. and CINDY K. HALLEY, husband and wife; Debtors. ROBERT G. DRUMMOND, Trustee, Plaintiff, -vs- COUNTY OF CHOUTEAU, a political subdivision of the State of Montana, Defendant.	Case No. 88-40629-11 Adversary Proceeding No. 90/00245

ORDER

At Butte in said District this 4th day of January, 1991.

In this adversary proceeding, the Trustee has filed a Complaint against the Defendant Chouteau County seeking turnover of cash in the sum of $18,016.83 and items of personal property which were taken into possession by the Defendant under the Montana Uniform Controlled Substances Act, Section 44-12-101, et seq. Mont. Code

Ann. After Answer, the parties have submitted the matter to the Court on an agreed Statement of Facts and each party has filed a Motion for Summary Judgment. I also note that Chouteau County has filed a Proof of Claim in the bankruptcy case for the amount of $18,016.83 plus the equipment sought to be recovered in this proceeding. Plaintiff cites jurisdiction under 28 U.S.C. § 157 and 11 U.S.C. § 1334. The turnover is sought under 11 U.S.C. § 542, claiming each item of property is an asset of the bankruptcy estate under 11 U.S.C. § 541(a).[1]

The agreed facts show that on December 3, 1987, the Defendant County, acting pursuant to Section 44-12-102, Mont. Code Ann., filed a "Petition For Forfeiture" in the Montana Twelfth Judicial District court against $28,260.26 and miscellaneous cultivation equipment as an *in rem* proceeding. The Petition alleges that the currency and equipment, all seized pursuant to search warrants, were fruits of an illegal marijuana growing operation, and therefore subject to forfeiture under Section 44-12-102, Mont. Code Ann. The Petition and Summons were served upon Debtors Douglas, Rhonda, William, Judith and Richard Kurth, and Clay and Cindy Halley and non-debtor Norwest Bank. On January 4, 1988, a verified Answer to the Petition was filed by all parties except Norwest Bank, which never appeared in said action.

On March 14, 1988, the parties in the forfeiture action filed a stipulation that hearing on the forfeiture would be

[1] The Trustee has not sought to invoke 11 U.S.C. § 549 dealing with post-petition transactions or transfers, although the facts indicate the possibility of a post-petition transfer under the Trustee's theory of title to the property.

postponed until resolution of criminal charges which had been filed against Kurths and Halleys. After the stipulation was approved by the state court, the parties negotiated an agreement and filed in the state court on October 6, 1988, a "Stipulation Re Forfeiture", whereby the county was allowed to enter a Judgment and Order of Forfeiture on October 28, 1988, which forfeited to the State of Montana for distribution to law enforcement agencies the sum of $18,016.83 cash and all drug-related paraphernalia. The balance of the cash which had been seized was released to the Kurths and Halleys, subject to potential liens asserted by the Montana Department of Revenue and other creditors. Before the Stipulation and Judgment on forfeiture had been filed and entered, the Debtors Kurth and Halley filed a Chapter 11 Petition in bankruptcy on September 9, 1988. The record shows the Defendant County never filed a Motion For Relief of the Automatic Stay under 11 U.S.C. §362(d) and had taken no action to either sell the forfeited equipment or utilize the cash of $18,016.83, because of the automatic stay. Instead, according to the Brief of the County, the County filed a Proof of Claim in the Chapter 11 case, as described above.[2] The Trustee Plaintiff was appointed in the Chapter 11 case on December 19, 1988, and commenced this adversary proceeding under Bankruptcy Rule 7001 on September 6, 1990. Defendant county for its defense to the Complaint asserts the property seized is not property of the estate.

[2] By reason of the decision in this case, the County's Proof of Claim is subject to disallowance under § 502(d). *In the Matter of Eye Contact, Inc.*, 97 B.R. 990 (Bankr. W.D. Wisc. 1989).

The issue before the Court is whether the cash and drug equipment were property of the estate under § 541(a) of the Bankruptcy code on the date the Chapter 11 Petition was filed. At the outset, I note the Debtors' bankruptcy Schedules and Statement of Affairs fail to list the pending County forfeiture action and Debtors-In-Possession never sought bankruptcy Court approval to sign and file the "Stipulation Re Forfeiture," which was filed post-petition. The State of Montana Department of Revenue filed a Motion for Relief of the Automatic Stay based, however, upon a wholly separate state statute called the Montana "Dangerous Drug Tax Act," Section 15-25-101, et seq. Mont. Code Ann. The seizure of the cash and goods was discussed at the § 341 First Meeting of Creditors in relation to the accounts which the Debtors owned at Waddell & Reed and Dain Bosworth, which had been seized by Chouteau County.

The contention of the Defendant County is that title to the property seized by warrant relates back to date of seizure or the date of the criminal act, citing *U.S. v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1890); *Texas v. Donoghue*, 302 U.S. 284, 58 S.Ct. 192, 82 L.Ed.2d 264 (1937); *Stout v. Green*, 131 F.2d 995 (9th Cir. 1942); *U.S. v. Bissell*, 866 F.2d 1343 (11th Cir. 1989); *In re Reid*, 60 B.R. 301 (Bankr. Md. 1986); *In re Ryan (I)*, 15 B.R. 514 (Bankr. Md. 1981); and *In re Ryan (II)*, 32 B.R. 794 (Bankr. Md. 1983). The Trustee, recognizing the relation back rule in forfeiture cases, argues that such doctrine is based upon express statutory language, such as contained in 21 U.S.C. Section 881(h) that title vests in the United States "upon commission of the act giving rise to forfeiture under this section" and the Maryland statute which states

that upon forfeiture, no property right shall exist in each property and title shall immediately vest in Baltimore City or County. Md. Code 1957, Art. 27, § 297(a)(6). By contrast, the Trustee argues, the Montana statute does not contain such express statutory language, and by reason of the procedure set forth under the Montana Act, forfeiture occurs only upon judgment by the state district court, which did not occur before commencement of the case.

This case involves an interpretation of the Uniform Controlled Substance Act (Act), adopted by Montana in 1979, with certain modifications. *See*, Am. Jur. 2d, *Desk Book*, Item No. 124 (Cum. Supp. 1990). The Act was designed to supplement the Uniform Narcotic Drug Act and Model State Drug Abuse Control Act to achieve uniformity between the laws of the several states and those of the federal government. 25 Am. Jur. 2d, *Drugs, Narcotics and Poisons*, Sec. 27.5 (Cum. Supp. 1990). According to the Commissioners' Prefatory Note to Uniform Controlled Substances Act, the act was designed to complement the new federal narcotic and dangerous drugs legislation (21 U.S.C. 801 et seq.) and provide an interlocking trellis of federal and state law to enable government at all levels to more effectively control the drug abuse problem. Under the Act, the uniform law makes subject to forfeiture (1) all controlled substances; (2) all raw materials, equipment or property used in any part of the drug process; (3) all property used as a container for the drug property; (4) all conveyances used to transport the drug property and (5) all books and records used in violation of the act. Uniform Controlled Substances Act § 505(a). As a general rule, forfeiture statutes

service the ends of law enforcement by preventing further illicit use of the property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687, 94 S.Ct. 2080, 2094, 40 L.Ed. 2d 452 (1974). The Montana statute, §44-12-102, does the same, except that it makes certain exception to conveyances, which is not an issue in this proceeding. The Montana procedural sections dealing with any forfeiture must be scrupulously followed as to notice of seizure and service of the forfeiture complaint as a due process requirement. *State of Montana v. 1978 LTD II and Henderson*, ___ Mont. ___, 701 P.2d 1365 (1985). The Montana statute provides there is a rebuttable presumption of forfeiture, § 44-12-203, so that the presumed owner of the property has the right to defend at a forfeiture hearing that the property was not used for the illegal purpose, that the use of the property occurred without his knowledge or consent, or that the claimant of a security interest has a bona fide security interest in the property, vested after reasonable investigation as to the moral character of the owner and without knowledge of illegal purpose of use. After the hearing on forfeiture, if the court finds the property was used for the illegal use, it shall order it disposed, first, to a bona fide security claimant, and then to the confiscating agency for its official use or sale. § 44-12-205. The proceeds of the confiscated property must be used by the particular local or state agency for enforcement of drug laws. § 44-12-206. Section 44-12-205(2)(a) expressed the rights of secured claimants "as of the date of seizure, it being the purpose of this Chapter to forfeit only the right title or interest of the owner." The scheme of the Montana Act, as well as

the Uniform Act, is therefore clear. The seizure takes place by the law enforcement official, either with or without warrant, after which a Petition is filed in district court to allow owners and other claimants of the property to defend on one of three grounds above described. Upon finding of the right to seizure based on illegal use of the property, the court then orders disposition of property, either in kind, by sale or transfer to the respective law enforcement agencies, or to an innocent claimant. The ultimate issue in the case *sub judice* is when does title transfer to the seized property.

It is clearly federal law since *United States v. Stowell*, supra, that:

> "By settled doctrine of this court, whenever a statute enacts that upon commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienation, even to purchasers in good faith." *Id.* at 16-17.

It is noteworthy that the federal statute involved in *Stowell*, set forth in the margin of the case, merely stated that the illegal distilling apparatus "shall be forfeited." The *Stowell* case has been followed consistently in forfeiture cases. *See, e.g. Simons v. United States*, 541 F.2d 1351 (9th

Cir. 1976); and *Ivers v. United States*, 581 F.2d 1367 (9th Cir. 1978).

I see no reason, particularly in view of the legislative scheme of the Montana Act, that the *Stowell* doctrine should not be applied in this case. I find support in this holding from several sources. First, under a similar Washington law on forfeiture in a drug case, the court in *Lowery v. Nelson*, 43 Wash. App. 747, 719 P.2d 594, 596 (1986), citing federal decisions, states:

> "These courts have concluded that government's right to seize and forfeit a vehicle vests at the time of the illegal conduct. That right may be executed later by physical seizure of the vehicle, so no warrant is required to perfect the forfeiture. The same reasoning applies to the Washington forfeiture statute * * * ."

Second, as stated in *Ivers*, supra, at 1367, and which principle was affirmed in *State v. 1978 LTD II*, supra, the forfeiture right of immediate vesting "must be 'defined and consummated' by the judgment of decree of a court" to satisfy constitutional requirements of notice and opportunity to be heard. The Montana statute fulfills that requirement. Since that is the purpose of the procedural provision of the Act, the Trustee's argument that title vests at the date of the judgment is misplaced. Third, the holding of *In re Reid*, supra, interpreting the Debtor's property right pursuant to § 541 of the Bankruptcy Code vis-a-vis the Maryland forfeiture statute, holds:

> "In conclusion, the court finds that the extent of the debtor's interest in the currency at the commencement of the case was a right to claim the

> currency at a forfeiture hearing; that such interest became property of the estate upon commencement of the case; and that such property of the estate was turned over to the trustee when he was given a forfeiture hearing provided in Maryland Annotated Code Act. 27, § 297."

Likewise, in this case, the Debtors-In-Possession were given the right to a forfeiture hearing, which they exercised by execution of the "Stipulation Re Forfeiture," wherein certain properties were conceded by the state to be released from forfeiture and other property was confiscated. That right of hearing, in accordance with *Ivers*, supra, and the Montana law, was in existence at the date of commencement of the case and, while the judgment was entered against the Debtor without relief of the automatic stay pursuant to the stipulation, I deem such matter unimportant in the context of this case since the issue of whether the judgment is void has never been raised by the Trustee. Moreover, if the judgment is void, *see, In re Shamblin*, 890 F.2d 123, 126, Ftn.3 (9th Cir. 1989), then the only right of the Trustee is another hearing on the forfeited property in accordance with *Reid*, supra. The Trustee does not seek that relief in the Complaint. Obviously, in a pre-petition forfeiture case, the defenses of the Trustee are limited due to the relation back doctrine, because the Trustee's rights are no greater than those of the Debtor, which is to demonstrate the seized assets are untainted by the criminal activity.

For all of the above reasons, I conclude the seizure of the tainted property of the Debtors occurred pre-petition, that title vested in the county at the date of seizure by operation of law pursuant to Section 44-12-102, Mont.

Code Ann., and that the Debtors were given an opportunity for hearing on the forfeiture, which resulted in consummation of the forfeiture by order of the state district court. From this conclusion, I hold the Trustee has no legal or equitable right to the property held by the Defendant County pursuant to the forfeiture. This is consistent with the purpose of 11 U.S.C. § 726(a), which is to prevent depletion of the estate by the Debtor for his previous wrongdoing so that the funds would not end up in the hands of the Debtor who committed the criminal act. *In re Reid*, supra, at 305. Thus, the Trustee has the right to establish a claim against the funds or property which are not tainted or fruits of the illegal conduct. Since that right was exercised by the Debtor-In-Possession who has the same powers as a Trustee, 11 U.S.C § 1107(a), the estate's interest in the seized property was recognized by the county and state court in the forfeiture proceeding.

IT IS ORDERED the Defendant's Motion For Summary Judgment is granted and the Plaintiff's Complaint is dismissed.

/s/ John L. Peterson
JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, MT 59703

MONTANA TWELFTH JUDICIAL DISTRICT COURT,
CHOUTEAU COUNTY

STATE OF MONTANA, Petitioner, -vs- $28,260.26 and Miscellaneous cultivation equipment, Respondent.	*	Cause No. DV-87-093 JUDGMENT and ORDER OF FORFEITURE (Filed Oct. 28, 1988)

****

On December 3, 1987, the State of Montana filed an action herein seeking the forfeiture of property described in a Petition For Forfeiture pursuant to section 44-12-101, MCA, et. seq. On October 6, 1988, the parties filed two stipulations with the court, wherein the parties agreed to the disposition of all property that is the subject of this action except for one item, an air conditioner. Now therefore, the court being fully advised in the premises and pursuant to the stipulations of the parties,

IT IS HEREBY ORDERED and ADJUDGED as follows:

1. Funds held in the First State Bank of Fort Benton on December 3, 1987, in checking account number 27-09060 in the name of Richard M. Kurth and Judith M. Kurth in the amount of Seven Hundred Nineteen and 27/100 Dollars ($719.27) shall be forfeited to the State of Montana for distribution to the law enforcement agencies involved in this action, to be deposited in their drug forfeiture accounts.

2. Funds held in Dain Bosworth, Inc., on December 3, 1987, in account number GF24 4885-6000 4L 4L in the name of Richard M. Kurth and Judith M. Kurth in the amount of Seventeen Thousand Two Hundred Ninety-seven and 66/100 Dollars ($17,297.66) shall be forfeited to the State of Montana for distribution to the law enforcement agencies involved in this action, to be deposited in their drug forfeiture accounts.

3. The items listed in Exhibit "A" which is atatched [sic] hereto and by this reference incorporated herein shall be forfeited to the State of Montana, may be removed from the premises owned by Richard M. Kurth and Judith M. Kurth by Chouteau County to the extent that removal has not already taken place, and may be sold by the Chouteau County Sheriff at public auction in the same manner provided by law for the sale of property under execution, and the proceeds from said sale shall be distributed to the law enforcement agencies involved in this action, to be deposited in their drug forfeiture accounts.

4. The court makes no disposition with respect to an automatic air conditioner system listed in Exhibit "A" in the petition for forfeiture, that item remaining subject to further action in this cause.

5. All other items which have been the subject of this action, including funds held by Dain Bosworth, Inc., in account number GF24 4885-6000 4L 4L held in the name of Kurth-Halley Cattle Company in the amount of Two Thousand Six Hundred Sixty-two and 37/100 Dollars ($2,652.37); and funds held by Waddell and Reed, Inc., in account number 11371036-750 held in the name of

Richard M. Kurth and Judith M. Kurth in the amount of Seven Thousand Five Hundred Eighty and 96/100 Dollars ($7,580.96) shall be released from this action to Respondents, subject, however, to the Respondents understanding that the funds held in said accounts may be subject to other liens or assessments by the Montana Department of Revenue or other creditors.

DATED this 27 day of October, 1988.

/s/ Illegible
DISTRICT COURT JUDGE

cc: Chouteau County Attorney
Julie A. Macek

EXHIBIT "A"

39	hanging lamps with shield (homemade)
41	electrical transformer boxes or relays
3	electrical breaker boxes
12	electrical timers
7	outlet boards with three outlet boxes each
3	round thermometers
6	overhead tracks for hanging lights
2	actuator motors for tracks
6	flourescent [sic] light fixtures
3	electric baseboard heaters
2	electrical thermostats with thermometer and humidity guage [sic] combination
1	pair of small pruning shears
11	electrical fans of mixed types
1	Ohaus Dial-O-Gram scale

Mr. Thomas J. Sheehy
Chouteau County Attorney
P.O. Box 518
Fort Benton, MT 59442
(406) 622-3396
Attorney for petitioner

MONTANA TWELFTH JUDICIAL DISTRICT COURT,
CHOUTEAU COUNTY

STATE OF MONTANA, Petitioner, -vs- $28,260.26 and Miscellaneous cultivation equipment, Respondent.	*	Cause No. DV-87-093 MOTION FOR FORFEITURE (Filed Oct. 28, 1988)

****

The parties hereby move this court to enter its forfeiture order in accordance with the Stipulations of the parties filed with this court on October 6, 1988. The parties further inform the court that in paragraph 1 of the Stipulation dated September 30, 1988, wherein reference is made to a stipulation dated September 4, 1988, said September 4, 1988, stipulation is the other stipulation filed with the court on October 6, 1988, signed by the Chouteau County Attorney and the Respondents Kurth and Halley.

A proposed order is submitted herewith for the court's use, said order having been first reviewed by the attorney's of record for the parties.

Respectfully submitted this 24th day of October, 1988.

/s/ Thomas J. Sheehy
Thomas J. Sheehy
Chouteau County Attorney
P. O. Box 518
Fort Benton, MT 59442

/s/ Julie A. Macek
Julie A. Macek
520 Third Ave. North
Great Falls, MT 59401
Attorney for Respondents

JULIE A. MACEK
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Telephone: (406) 727-5050
Attorney for Respondents

MONTANA TWELFTH JUDICIAL DISTRICT COURT,
CHOUTEAU COUNTY

STATE OF MONTANA, Petitioner, -vs- $28,260.26 and Miscellaneous cultivation equipment, Respondent.	No. DV-87-093 STIPULATION RE FORFEITURE (Filed Oct. 26, 1988)

COMES NOW, JULIE A. MACEK, Co-Counsel for the above Respondents and hereby stipulates with THOMAS J. SHEERY, Chouteau County Attorney on behalf of the Petitioner, as follows:

1. That the prior Stipulation of the parties dated September 4, 1988, be filed with the Court and that the Court issue its Forfeiture Order accordingly.

2. That the parties hereby agree that one item, an air conditioner, has not been included in the original Stipulation and is it disposition is hereby reserved by the Court.

DATED this 30th day of September, 1988.

/s/ Thomas J. Sheehy
THOMAS J. SHEEHY
Chouteau County Attorney

/s/ Julie A. Macek
JULIE A. MACEK
Attorney for Respondent

3. That the DAIN BOSWORTH, INC. account number GF24-4885-8100 4L 4L held in the name of RICHARD M. KURTH and JUDITH M. KURTH in the amount of SEVENTEEN THOUSAND TWO HUNDRED NINETY-SEVEN and 66/100 DOLLARS ($17,297.66) shall be forfeited to Choteau [sic] County.

4. That the Waddell & Reed, Inc. account number 11371036-750 held in the name of RICHARD M. and JUDITH M. KURTH in the amount of SEVEN THOUSAND FIVE HUNDRED EIGHTY and 96/100 DOLLARS ($7,580.96) shall be released from the forfeiture action by Chouteau County. Respondents understand that said money may be subject to other liens or assessments by the Department of Revenue or other creditors.

5. That the following items shall be forfeited by the Respondents and may be removed from the premises by Chouteau County if not already done so:

39 hanging lamps with shield (homemade)

41 electrical transformer boxes or relays

3 electrical breaker boxes

12 electrical timers

7 outlet boards with three (3) outlet boxes each

3 round thermometers

6 overhead tracks for hanging lights

2 actuator motors for tracks

6 flourescent [sic] light fixtures

3 electric baseboard heaters

2 electric thermostats with thermometer and humidity guage [sic] combination

1 pair of small pruning shears

11 electrical fans of mixed types

1 Ohaus Dial-O-Gram scale

/s/ Thomas Sheehy illegible
THOMAS SHEEHY DATED
Chouteau County
Attorney

/s/ Judith Kurth illegible
JUDITH KURTH DATED

/s/ Rhonda Kurth 8-22-88
RHONDA KURTH DATED

/s/ Cindy Halley 8-22-88
CINDY HALLEY DATED

/s/ Richard Kurth illegible
RICHARD KURTH DATED

/s/ Douglas Kurth 8-22-88
DOUGLAS KURTH DATED

/s/ Clay Halley 8-22-88
CLAY HALLEY DATED

/s/ William Kurth 9-4-88
WILLIAM KURTH DATED

House Tax Committee

* * *

Taxation Committee
March 5, 1987
Page 4

CONSIDERATION OF HOUSE BILL NO. 791: Rep. Bill Strizich, House District #41, sponsor of HB 791, said the bill would create a controlled substance tax for possession and storage of dangerous drugs. Rep. Strizich provided copies of a drug confiscation list and an article from the Wall Street Journal (Exhibits #3 and #4) and said the tax is substantial, but appropriate. He also provided copies of proposed amendments (Exhibit #5).

PROPONENTS OF HOUSE BILL NO. 791: Michael Murray told the Committee he represented 31 chemical dependency treatment centers in the state, and said revenue from such a tax would help in funding these programs.

Gary Carroll, Department of Justice, Criminal Investigation Division, said he is not an attorney and has no legal opinion, but has supported the concept for four years. Mr. Carroll said the amendment would help with enforcement, and commented that the figures for marijuana on the drug confiscation list are a little low.

OPPONENTS OF HOUSE BILL NO. 791: There were no opponents of the bill.

TECHNICAL COMMENTS ON HOUSE BILL NO. 791: Ken Morrison, Administrator, Income Tax Division DOR, told the Committee DOR needs rulemaking authority, as well as to be notified of seizure and possession charges

and federal and state forfeitures. Mr. Morris said he had no idea what the percentage should be, but was aware the 1% collection fee is insufficient and may need to be about 5%. He told the Committee he has been in touch with Florida, who has a similar program, and recommended using general DOR lien provisions in Title 15, chapter 1, part 7.

Chairman Ramirez requested that DOR prepare amendments to meet its concerns.

QUESTIONS ON HOUSE BILL NO. 791: Rep. Patterson asked if the penalty for evasion were stiff. Ken Morrison replied he assumed standard evasion procedures would apply.

CLOSING ON HOUSE BILL NO. 791: Rep. Strizich made no closing comments.

DISPOSITION OF HOUSE BILL NO. 791: Rep. Ream made a motion that HB 791 DO PASS and that Rep. Strizich' amendment and DOR's amendments be approved, (Exhibits #4 and #5). The motions for both amendments CARRIED unanimously.

Rep. Ream made a motion to approve the Statement of Intent. The motion CARRIED unanimously.

Rep. Ream made a motion that HB 791 DO PASS AS AMENDED.

Rep. Williams commented he felt it was inappropriate to tax illegal possession of dangerous drugs. Greg Groepper replied that the federal government originally established a federal stamp tax in the 1930's on marijuana. He said the DOR amendment replaces the section on lines with a

warrant for restraint, and utilizes the usual tax collection method.

The motion made by Rep. Ream CARRIED with all members voting aye, except Rep. Williams, who voted no.

HB 791, introduced bill, be amended as follows:

1. Title, line 6.
Following: "TAX;"
Strike: "AND"
Insert: "GRANTING RULEMAKING AUTHORITY TO THE DEPARTMENT OF REVENUE; PROVIDING FOR FUNDING OF THE ADMINISTRATION OF THE TAX; STATUTORILY APPROPRIATING THE ADMINISTRATIVE FUNDING;"

2. Title, line 7.
Following: "COLLECTED"
Insert: "; AND AMENDING SECTION 17-7-502, MCA"

3. Page 1.
Following: line 7
Insert: "WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and

WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and

WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to

continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.

THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anti-crime initiatives without burdening law abiding taxpayers."

4. Page 2, line 3.
Following: "of"
Strike: "1%"
Insert: "5%"

5. Page 3, lines 17 through 19.
Following: "5," on line 17
Strike: remainder of line 17 through line 19 in its entirety
Insert: "Administration and enforcement – department rules. (1) All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such other information which the department may require, in a manner and on a form prescribed by the department.

(2) The deficiency assessment provisions of 15-53-105, the civil penalty and interest provisions of 15-53-111, the criminal penalty provisions of 15-30-321(3), the estimation of tax provisions of 15-53-112, and the statute of limitations provisions of 15-53-115 apply to this tax

and are fully incorporated by reference in this chapter. The department may adopt such rules as are necessary to administer and enforce the tax."

6. Page 3, line 24 through line 3, page 4.
Following: "7," on line 24, page 3
Strike: remainder of line 24 through page 4, line 3 in its entirety
Insert: "Warrant for distraint. If all or part of the tax imposed by this chapter is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded."

7. Page 4, line 12.
Following: "proceeds."
Insert: "(1)"

8. Page 4, line 15.
Following: "basis."
Insert: "(2)"

9. Page 4.

Following: line 18
Insert: "(3)"
Following: "tax"
Insert: "proceeds as follows:

(a) 85%"

10. Page 4, line 23.
Following: "jails"
Insert: "; and

(b) 15% to the special law enforcement assistance account created in 44-13-101 for the activities described in 44-13-103"

11. Page 4.
Following: line 23
Insert: "Section 10. Special revenue account. (1) There is created a special revenue fund to be called the dangerous drug tax administration fund.

(2) All administrative fees collected under [section 3(1)] shall be deposited by the department into the dangerous drug tax administration fund.

(3) The money in the dangerous drug tax administration fund may be expended by the department to administer the tax and pay any refund required by this chapter.

(4) The appropriation made in subsection (3) is a statutory appropriation as provided in 17-7-502.

Section 11. Section 17-7-502, MCA, is amended to read:

"17-7-502. Statutory appropriations – definition – requisites for validity. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations:

(a) 2-9-202;

(b) 2-17-105;

(c) 2-18-812;

(d) 10-3-203;

(e) 10-3-312;

(f) 10-3-314;

(g) 10-4-301;

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* * *

Senate Taxation
March 25, 1987
Page Six

CONSIDERATION OF HB 791: Representative Strizich, House District 41, presented this bill to the committee. This bill is intended to create a controlled substance tax. It would impose a tax on the possession or storage of any of those substances, defined under statute as dangerous drugs. Drug dealers, under this act, would be levied a tax equal to 10% of the market value of any substance falling under this category. He furnished the committee with an article from *The Wall Street Journal* in relation to this and a list of drugs and amounts confiscated in 1986, attached as Exhibit 4.

PROPONENTS: None.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Crippen asked Representative Strizich how would you prove ownership to tax it.

Representative Strizich said in a criminal case, there must be proof, beyond a reasonable doubt, that this person is carrying dangerous drugs. In a civil administrative proceeding you must show a preponderance of evidence that this person is storing dangerous drugs.

Senator Hirsch said the word tax bothers him and asked if a penalty could be used.

Representative Strizich when you are talking about a penalty you are talking about a punitive measure and he thinks that would be entering a whole new ball game. We want to have the effect of a tax and, therefore, allow the fairness of our tax system to enter into this.

Senator Halligan asked if there was a threshold amount before the tax would apply.

Representative Strizich said we left that open to any amount.

Senator Neuman asked if he had visited with members of the law enforcement community and are they in support of this law.

Representative Strizich said he has talked with the Department of Justice here and did offer some amendments that make it administratively more easy to handle. Three other states effectively use this law.

Senator Neuman asked John LaFaver if this is something we could legitimately do.

John LaFaver said the way the bill is amended, the only administrative cost that will incur will be paid for by the revenues that would come from the bill. He is somewhat acquainted with the Revenue Director in the State of Minnesota and he views this piece of legislation very seriously. We might get revenue from this specific tax, and in certain instances lead us to income that would otherwise not be taxed. He thinks it is worth a shot.

Senator Mazurek asked if there was any discussion in the House on the earmarking of the money.

Representative Strizich said there was some discussion on that and the feeling was they could go with that given the fact that we really don't know what revenue we are looking at and that is probably as appropriate a place as any to funnel the money.

Senator Eck asked if the illegal storing of prescription drugs would be covered under this.

Representative Strizich said yes.

Senator Halligan referred to page 3, lines 14-17, and asked if the individual at the Department would know the street value of these drugs.

Representative Strizich said that is there in the event we find a drug that isn't publicly contained in statute, so that we could somehow determine a street value of that.

Senator Halligan asked what if you're someone that has been picked up with drugs, but you do not have any money to pay the tax.

John LaFaver said there will be a number of instances where there won't be any revenue collected.

Representative Strizich closed.

No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH-HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, Trustee,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

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December 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED FOR REVIEW

Is the Montana Dangerous Drug Tax, as applied to the Kurths, who have been previously convicted and punished for dangerous drug violations, violative of the Double Jeopardy Clause's prohibition against multiple punishments for the same offense under the rationale of *United States v. Halper*, 490 U.S. 435 (1989).

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STATEMENT OF THE CASE

On October 18, 1987, the Kurth family was apprehended for growing marijuana on their Montana farm. (Trial Transcript [Tr. Trans.] p. 74; App. to Pet. for Cert. at 29, ¶ 14) A search of their farm uncovered marijuana plants, marijuana and marijuana derivatives.[1] (Plaintiffs' Exhibit [Pl. Exh.] 14; App. to Pet. for Cert. at 29-30, ¶ 15)

The Kurths were charged with various criminal offenses including criminal possession and sale of dangerous drugs and conspiracy to possess and sell dangerous drugs. (Pl. Exh. 1, 2, 4, 6, 8, 10, and 12; Tr. Trans. p. 74) Ultimately, the Kurths pled guilty to these charges. (Pl. Exh. 3, 7, 9, 11 & 13; Tr. Trans. pp. 74-75) The state trial court imposed various sentences ranging from twenty years in the Montana State Prison, with ten years suspended, for Richard Kurth, to deferred sentences for the others. (App. to Pet. for Cert. at 30-32, ¶ 17)

As the criminal proceedings made their way through state court, the State also prosecuted a civil forfeiture action which resulted in the confiscation of approximately $18,000 from the Kurths. (App. to Pet. for Cert. at 34, ¶ 25) The State deposited these funds in the drug forfeiture accounts of the law enforcement agencies

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[1] In an attempt to color the Court's perspective of this case, Montana takes substantial liberties with the underlying record. For example, Montana asserts that the "Kurths sold . . . about 5 to 10 pounds a week . . . at $1800 per pound." Brief for Montana at 3-4, 7 n.8. These statements are without support in the record. Montana cites Tr. Trans. 93 and Exhibit "DD" to support these assertions, but these statements do not appear there or elsewhere in the record.

involved in the criminal proceedings. (App. to Brief for Montana at 21, ¶ 1)

Then, a third proceeding was launched against the Kurths by the State, this time through Petitioner, Montana Department of Revenue (hereinafter referred to as "Montana" or "D.O.R."), which assessed a "tax" of more than $800,000 against the Kurths and began collection proceedings through the administrative process. (*See e.g.* Pl. Exh. 19, 23; App. to Pet. for Cert. at 33-35, ¶¶ 20-27) The basis for this "tax" is the "Dangerous Drug Tax Act," Montana Code Annotated ("MCA") §§ 15-25-101-123.[2]

Montana's "Dangerous Drug Tax Act" purports to establish "a tax on the possession and storage of dangerous drugs." MCA § 15-25-111(1). "[E]ach person possessing or storing dangerous drugs is liable for the tax" in an amount determined by the department. *Id.* This tax does not apply to any person "authorized by state or federal law to possess or store dangerous drugs." MCA § 15-25-112. The burden of proving lawful possession of the dangerous drug is on the "taxpayer." *Id.* Liability for the tax does not arise until the "taxpayer" is arrested. Administrative Rule of Montana ("A.R.M.") 42.34.102(1)

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[2] Yet a fourth prosecution for unlawful possession of marijuana, among other charges, was attempted by the Federal Government against Richard Kurth. *United States v. Kurth and Michunovich*, No. CR-89-006-GF (Dist. Mont. 1989). (Tr. Trans. at 75) The federal district court ultimately dismissed this case because it found the conduct of the United States, as it concerned the prosecution of Richard Kurth, "selective or vindictive . . . " and thus in violation of due process of law. *Id.* Memorandum Opinion, dated April 21, 1989 at 6-7; *see also* Tr. Trans. at 75.

(The drug tax administrative rules are set forth in the Appendix to this Brief).[3] At that time, the police officer responsible for the "taxpayer's" arrest completes the tax return and gives the arrested "taxpayer" an opportunity to sign it. MCA § 15-25-113(1); A.R.M. 42.34.102(3). If the "taxpayer" refuses to sign the return, the arresting officer must "certify and submit the form to the department within 72 hours of the arrest." *Id.*[4]

In September 1988, the Kurths filed a Chapter 11 bankruptcy petition automatically staying the administrative proceedings before the D.O.R. pursuant to 11 U.S.C. § 362(a). Montana filed several proofs of claim with the

---

[3] The Department calculates the "tax" pursuant to the provisions of MCA § 15-25-111(2), which provides in relevant part:

* * *

> (2) [t]he tax on possession and storage of dangerous drugs is the greater of:
>
> (a) ten percent of the assessed market value of the drugs as determined by the department; or
>
> (b) (i) $100.00 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;
>
> (ii) $250.00 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized. . . .

MCA § 15-25-111(2).

[4] The dangerous drug tax return, filed by the arresting officer, includes the "taxpayer's" "name, address, social security number, arrest or booking number and the type and quantity of the dangerous drugs possessed or stored." A.R.M. 42.34.102(5). (*See e.g.* Pl. Exh. 15)

Bankruptcy Court. The ultimate amended proof of claim was for $864,940.99, consisting of $684,914.30 in principal, $113,134.44 in penalties and $66,914.30 in interest. (App. to Pet. for Cert. at 35, ¶ 27)

The Kurths filed an adversary proceeding challenging Montana's Amended Proof of Claim and the constitutionality of Montana's Dangerous Drug Tax Act. (District Court Record "R" 7) Following a two-day trial, the bankruptcy court determined that Montana's tax on the marijuana plants and derivatives was arbitrary and capricious and therefore illegal. *In Re Kurth Ranch*, 122 Bankr. 759 (Bankr. D. Mont. 1990). (App. to Pet. for Cert. at 43-46, 60) The court concluded that Montana's assessment on the remaining marijuana satisfied the requirements of the Act but, as applied to the Kurths, ran afoul of the Double Jeopardy Clause as interpreted in *United States v. Halper*, 490 U.S. 435 (1989). (App. to Pet. for Cert. at 51, 58-59)

On appeal the district court affirmed the bankruptcy court. *In Re Kurth Ranch*, No. CV-90-084-GF (D.Mont. Apr. 23, 1991) (App. to Pet. for Cert. at 22) It found that "[a]s applied to the factual situation presented, the Montana Dangerous Drug Tax Act simply punishes the Kurths a second time for the same criminal conduct." (*Id.*)

On appeal to the Ninth Circuit, Montana abandoned its challenge regarding the arbitrary valuation of the plants and appealed only the district court's affirmance of the bankruptcy court's determination that the $208,150 tax on the harvested marijuana violated the Double Jeopardy Clause. (App. to Pet. for Cert. at 6) Applying *Halper*, the Ninth Circuit affirmed the lower courts' holding that "[t]he tax assessment levied by Revenue in this case constitutes an impermissible second punishment in violation

of the federal Constitution's Double Jeopardy Clause." *In Re Kurth Ranch*, 986 F.2d 1308, 1311-12 (9th Cir. 1993). (App. to Pet. for Cert. at 10-12)[5]

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[5] Montana and the Solicitor General, admitting that the argument was not raised below, *see Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (Supreme Court declined to consider argument not presented to Court of Appeals) argue that double jeopardy does not apply to five members of the Kurth family because they pled guilty in state court to conspiracy to possess dangerous drugs. *United States v. Felix*, 112 S.Ct. 1377 (1992). This argument ignores the context of the guilty pleas before the state trial court. All members of the family were charged with criminal possession of dangerous drugs and conspiracy to commit the offense of criminal possession of dangerous drugs. (Pl. Exh. 3, 7, 9, 11 & 13) All members of the family initially entered "not guilty" pleas to these charges. (*Id.*) This plea was later withdrawn and a plea of guilty, for five of the six family members, was entered concerning the conspiracy charge. (*Id.*) At that time, the County Attorney moved to dismiss the remaining charge of criminal possession of dangerous drugs and that motion was granted. (*Id.*) Clearly, the State could not, after dismissing the second charge, recharge the individual defendant. Such conduct by the state would constitute a violation of due process, *see, e.g., Mabry v. Johnson*, 467 U.S. 504, 507 (1984) (Once a plea agreement is embodied in the judgment of a court the ensuing guilty plea implicates the Constitution), and in the context of the entire criminal process constitute a double jeopardy violation, incorporated into the Due Process Clause of the Constitution.

It follows that where the charges were merged and a plea agreement made, which disposed of all charges, both due process and double jeopardy preclude a subsequent punishment based on the earlier charge disposed of by plea agreement. *Cf. Sealfon v. United States*, 332 U.S. 575 (1948) (acquittal of conspiracy charge barred subsequent prosecution for substantive offense under principle of *res judicata*).

Following Montana's reasoning to its logical conclusion, it should be noted that, at the drug tax trial, the only evidence

SUMMARY OF ARGUMENT

The Double Jeopardy Clause prohibits multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435 (1989). In *Halper*, this Court held that a civil sanction may be punitive under certain circumstances and thus within the scope of the Constitution's double jeopardy prohibition. The Court in *Halper* adopted the following test: "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment. . . . " 490 U.S. at 448. Last term, this Court reaffirmed *Halper* in *Austin v. United States*, 113 S.Ct. 2801 (1993).

Montana and the Solicitor General try to distinguish *Halper* because *Halper* did not involve a tax and courts are traditionally deferential to taxes. The flaw in this argument is recognized by the Solicitor General who acknowledges "that it is conceivable that a legislature could attempt to impose a criminal-type penalty under the label of a tax." Brief of Solicitor General at 20. Exactly. The Double Jeopardy Clause could be easily evaded if a second punishment were imposed under the guise of a tax. Thus, taxes imposed after criminal convictions, on the same offense, must be closely examined.

---

offered by Montana to support the imposition of the tax were the documents of conviction and sentencing. (Tr. Trans. at 2, 86-115, 246-270) Accordingly, its drug tax assessment against five of the Kurths should fail for simple want of proof. Montana plainly failed to prove possession of marijuana. All it proved was a plea to "an agreement" to possess (i.e conspiracy).

The proper approach to considering this question was outlined in *United States v. LaFranca*, 282 U.S. 568 (1931) – a case which addressed the double jeopardy issue but which disposed of the case on statutory grounds. There, defendant was convicted and punished in a criminal prosecution. The government then brought a civil action for double taxes and penalties based upon the same conduct. The Court concluded that the defendant could not have been prosecuted criminally for the same acts and the fact that the second proceeding was a civil action did not alter this rule. The Court also concluded that the label affixed to the second proceeding was not controlling and rejected the government's argument that the second measure was a civil tax rather than punishment under double jeopardy.

Montana and Amici also attempt to escape judicial review by arguing that taxes serve a dual function – and that this Court has abandoned efforts to distinguish between revenue raising and regulatory taxes. This argument fails to recognize, however, the difference between a tax that regulates and one which is in part punitive. The fact that the Court may be reluctant to review the purpose of a tax for regulatory features, has little to do with whether a tax is punishment under double jeopardy. Many courts, including this Court, have recognized that such taxes serve "to punish and deter those in possession of illegal drugs." *Sims v. State Tax Comm'n*, 841 P.2d 6, 13 (Utah 1992). *See also Leary v. United States*, 395 U.S. 6 (1969).

This Court rejected a similar argument to Montana's in *Marchetti v. United States*, 390 U.S. 39 (1968), where the Court made it clear that it will rigorously review those

features of a tax which impinge on constitutional rights: "the constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers." 390 U.S. at 58. While *Marchetti* arose in the context of the Self-Incrimination Clause, the Double Jeopardy Clause commands the same careful scrutiny.

Montana and Amici further seek to distinguish *Halper* and *Austin* by arguing that taxes are designed simply to raise revenue. This argument is not persuasive in light of the concession that punitive measures may be adopted under the guise of a tax. In any event, Montana's drug tax is not a general revenue tax. Even if it were, this Court often reviews many types of state tax measures for constitutional compliance. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Montana's argument, if adopted by this Court, recognizes no limit to the punitive sanction Montana may impose under the "tax" label in pursuit of a purported revenue raising purpose. This argument is inconsistent with the Double Jeopardy Clause's proscription of multiple punishment.

Recognizing the weakness in its first argument for immunity from judicial review, the Solicitor General suggests a fall-back position – "two key principles" to assess whether a tax is based on a revenue-raising purpose. First, if the tax is imposed on both legal and illegal goods no further inquiry is warranted. The Solicitor General concedes that Montana's drug tax fails this test.

The second principle is whether the tax is of a type, and in an amount, that is ordinarily imposed on legal goods. The Solicitor General attempts to justify Montana's tax under this principle, but, in fact, Montana's tax fails. No other Montana tax is assessed on the basis of the "greater of" ten percent of the market value of the product, or a fixed amount, as determined by the aggregate weight. In addition, unlike other taxes, the drug tax applies only upon criminal apprehension. Finally, the resulting tax rate is plainly excessive.

Montana also argues that if this Court decides to review Montana's drug tax, it will immerse itself in a "quagmire." This Court appreciates the difficulties in tax review but has never shirked from its responsibilities under the Constitution. Drug taxes are therefore subject to double jeopardy analysis.

Looking, as *Halper* commands, at the character of the actual sanctions imposed on the individual by the machinery of the state, the retributive effect of Montana's drug tax is clear. Liability for the tax is tied directly to the commission of a crime and conditioned upon the culpability of the taxpayer. The tax cannot be paid until the individual is arrested at which time the arresting officer prepares the drug tax return. Payment of drug taxes may also be included as part of a plea agreement between the taxpayer and the county attorney prosecuting the criminal case. In *Austin* this Court relied upon similar factors in concluding that *in rem* forfeitures of property are punitive in nature and therefore subject to review under the Excessive Fines Clause of the Eighth Amendment.

Montana's drug tax stands in contrast to the federal marijuana tax reviewed by this Court in *United States v. Sanchez*, 340 U.S. 42 (1950), because the federal tax was not conditioned upon the commission of a crime. If it had been, and had there been a criminal conviction and a double jeopardy defense raised, careful review of the drug tax would have been necessary.

If, as Montana and Amici argue, Montana's drug tax were solely for a revenue-raising purpose, it could have been carefully tailored to achieve that purpose without being necessarily linked to a criminal prosecution. Minnesota's drug tax, for example, provides for the anonymous purchase of tax stamps prior to and independent of any criminal prosecution for unlawful possession of dangerous drugs.

The deterrent purpose of Montana's drug tax is also evident in the excessive rate of the tax. The clearest evidence of this deterrent purpose is the State's valuation of 100 pounds of shake, less valuable marijuana, at a rate of eight times its market value. The Montana official responsible for assessing the tax in this case testified that despite his long tenure with D.O.R., he never administered any tax which is eight times greater than the market value of the product. For these and other reasons, the bankruptcy court properly determined that the Dangerous Drug Tax Act promotes the traditional aims of punishment – retribution and deterrence.

Montana argues that the drug tax is an excise tax administered like all other taxes. Not true. No other tax has the features discussed above. Moreover, if this argument were accepted, there would be no limit on the amount of taxes Montana could impose.

Finally, where as here, a defendant has previously sustained a criminal penalty and the civil sanction sought in the second proceeding appears punitive, the defendant is entitled to an accounting of the government's costs. Respondents recognize that such accounting cannot be absolutely precise. Montana, however, did not even make a passing attempt to justify the tax as proportional. Thus there is no evidence in the record upon which a remedial finding can be based.

Montana and Amici argue that an accounting is not required and that this Court may simply take judicial notice of the cost of drug abuse on society. This argument is inconsistent with the "intrinsically personal" protection of the Double Jeopardy Clause and the "particularized assessment" required by *Halper*. Moreover, this Court in *Austin* rejected an identical argument advanced by the United States. In sum, on the basis of the evidence before it, the courts below properly found that Montana's tax simply punishes the Kurths a second time for unlawful possession of marijuana.

ARGUMENT

I. CIVIL SANCTIONS, INCLUDING TAXES, MAY CONSTITUTE PUNISHMENT WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE.

A. INTRODUCTION – THE DOUBLE JEOPARDY CLAUSE FORBIDS MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

The Double Jeopardy Clause of the Constitution protects against three separate abuses: (1) a second

prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989).[6]

The pivotal question in this case is whether the Montana Drug Tax, imposed on the Kurths after criminal conviction, is, in part, punitive, for if it is, it constitutes a second "punishment" for the same offense in violation of the Double Jeopardy Clause.

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[6] In *Halper* this Court observed that the protection against multiple punishments for the same offense "[h]as deep roots in our history and jurisprudence:

> As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 434 (1789-1791) (J. Gales ed. 1834). In our case law, too, this Court, over a century ago, observed: "If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall. 163, 168 (1874).

490 U.S. at 440.

B. THE *HALPER* AND *AUSTIN* CASES ESTABLISH THAT CIVIL SANCTIONS AND CIVIL FORFEITURES MAY BE "PUNISHMENT" UNDER CERTAIN CIRCUMSTANCES.

Halper involved a double jeopardy challenge to a "civil" penalty imposed pursuant to the civil false claims act, 31 U.S.C. §§ 3729-3731, after conviction under the criminal false-claims statute, 18 U.S.C. § 287. The government argued that double jeopardy was not implicated because the second sanction was "civil" in nature. 490 U.S. at 441, 446-47. Rejecting that argument, this Court held that a sanction, although denominated "civil," may be punitive under certain circumstances, and thus within the scope of the Constitution's double jeopardy prohibition:

> *In making this assessment, the labels "criminal" and "civil" are not of paramount importance.* It is commonly understood that *civil proceedings may advance punitive as well as remedial goals*, and, conversely, that both punitive and remedial goals may be served by criminal penalties.

490 U.S. at 447 (emphasis added).[7]

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[7] The Solicitor General argues, in an attempt to distance tax measures from the civil penalty involved in *Halper*: "Tax statutes – unlike civil penalty provisions – do not come before a court accompanied by an express label indicating that a penalty was intended." Brief for Solicitor General at 19. Exactly. If the argument is accepted, a sophisticated legislature will avoid calling a punitive measure a "civil penalty" or "forfeiture," but will, instead, call it a tax. *Cf. Trop v. Dulles*, 356 U.S. 86, 94 (1958) ("How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!").

In the present case, the Ninth Circuit carefully followed the reasoning in *Halper* in holding that "[a]lthough the Montana statute labels the assessment as a 'tax,' this in itself is not dispositive as to whether the imposition constitutes an impermissible second punishment. A state cannot evade the prohibitions of the federal constitution merely by changing the label of the punishment." 986 F.2d at 1310. The Ninth Circuit cited the following language from *Halper*:

> Indeed, " 'labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.' " *Id.* 490 U.S. at 448 . . . (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 . . . (1988)).

986 F.2d at 1310-1311.

Last term, after the Ninth Circuit's decision in this case, this Court reaffirmed the *Halper* holding in *Austin v. United States*, 113 S.Ct. 2801 (1993). It followed *Halper* in deciding that a civil forfeiture pursuant to the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 881(a)(4) and (a)(7), may constitute punishment and may therefore violate the Eighth Amendment's Excessive Fines Clause in certain circumstances. *Austin*, 113 S.Ct. at 2812.

C. UNDER *HALPER-AUSTIN*, A CIVIL SANCTION CONSTITUTES PUNISHMENT UNLESS SOLELY NON-PUNITIVE IN NATURE.

Given the holdings in *Halper* and *Austin*, the question then becomes how to assess the circumstances in which a

measure, although denominated as "civil," implicates double jeopardy because it constitutes punishment. In *Halper*, this Court held that the constitutional protection against double jeopardy is "intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." 490 U.S. at 447.

> To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. *Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.*

490 U.S. at 448 (emphasis added). *Halper* further stated that "retribution and deterrence are not legitimate nonpunitive governmental objectives." *Id.* at 448, *quoting Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).

From this analysis, the following test was applied:

> [A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment. . . .

Halper, 490 U.S. at 448 (emphasis added).

Both Montana and the Solicitor General have mischaracterized this standard. Referring to *Halper*, Montana states: "One of the tests used . . . is whether 'the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.' " Brief for Montana at 29-30 (emphasis in the original). This stands the test on its head. In fact, the test in *Halper*, as reiterated in *Austin*,

is that a civil proceeding can be characterized as imposing "punishment" if it cannot be *solely* explained as serving a compensatory or remedial purpose. *Halper*, 490 U.S. at 448 (emphasis added).

The Solicitor General is equally as licentious in his characterization, arguing:

> [w]hen analyzing a civil measure that has dual penal and non-penal purposes . . . [i]f the non-penal purposes are sufficient, the fact that the measure may serve penal purposes as well is essentially irrelevant.

Brief for Solicitor General at 14-15. This is difficult to square with the Double Jeopardy Clause, which plainly forbids multiple punishments for the same offense. It is equally difficult to square with the holdings of *Halper* and *Austin*. This Court said in *Austin*: "Under *United States v. Halper*, 490 U.S. 435, 448 (1989), the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion." 113 S.Ct. at 2810 n.12 (emphasis in the original).

These misstatements of the *Halper* standard are particularly indefensible in light of *Austin's* unequivocal reaffirmation of *Halper* at least five separate times.[8] There

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[8] *See Austin*, 113 S.Ct. at 2806 ("We said in *Halper* that a 'civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term' "); *Id.* at 2810 n.12 (quoted above); 113 S.Ct. at 2812 (" '[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' *Halper*, 490 U.S., at 448") (emphasis in the original); *Id.* at 2806 ("We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish"); *Id.* at 2812 ("[W]e cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense . . . ' ") (footnote and citation omitted).

is a perfectly sound reason for *Halper*'s careful phrasing. The Double Jeopardy Clause forbids multiple punishments for the same offense. Thus, to the extent a civil sanction punishes, it runs afoul of the Double Jeopardy Clause. *Halper*, 490 U.S. at 448-49.

D. A MEASURE DENOMINATED AS A TAX MAY CONSTITUTE "PUNISHMENT" WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE.

Montana and Amici argue that *Halper* and *Austin* are not applicable because the Montana Drug Tax is not a "civil sanction," but rather a "tax." They argue for virtual immunity for taxes from judicial review, arguing that courts traditionally are deferential to tax measures. They further argue that the purpose of taxes is generally to raise revenue and that the "compensatory/remedial" *Halper* test is therefore inapposite. Indeed, the Solicitor General goes so far as to argue that for double jeopardy purposes, punishment is imposed "[o]nly if it is not,

despite its label, a tax at all. . . . " Brief for Solicitor General at 15. These arguments are addressed below.

1. Tax Measures Are Not Immune From Judicial Review.

The central flaw in the argument that taxes are virtually immune from judicial review is recognized by the Solicitor General, who states: "*We acknowledge that* it is conceivable that *a legislature could attempt to impose a criminal-type penalty under the label of a 'tax.'* " Brief for Solicitor General at 20 (emphasis added). Precisely. The multiple punishment proscription of the Double Jeopardy Clause could be easily evaded if a second punishment may be imposed under the guise of a "tax" and thereby escape judicial review. Accordingly, taxes imposed subsequent to criminal convictions must be closely examined.

The proper approach to considering this question was outlined in this Court's decision in *United States v. LaFranca*, 282 U.S. 568 (1931) – a case Montana and Amici ignore. In that case, the defendant was convicted and punished in a criminal prosecution (unlawful sales of intoxicating liquor under the National Prohibition Act). After the conviction and fine in the criminal prosecution, the government brought a civil action against LaFranca for double taxes and penalties based on the same unlawful acts that formed the basis of the criminal conviction. *Id.* at 569-70. The Court framed the issue as follows:

> Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

Id. at 573. The Court answered, no, concluding that the label affixed to the second proceeding was not controlling, citing *United States v. Chouteau*, 102 U.S. 603 (1880).

In rejecting the government's argument that the second measure was a civil tax rather than a punishment under double jeopardy, the Court said:

> A tax is an enforced contribution to provide for the support of government; a penalty as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law, is settled by *Lipke v. Lederer*, 259 U.S. 557, 561, 562. . . .

282 U.S. at 572. The Court stopped short of finding a double jeopardy violation, avoiding the "grave" constitutional question that would arise if the defendant were punished a second time. It construed a statutory provision barring further "prosecution" of those convicted under the criminal statute as precluding the civil action. *Id.* at 572, 575. "[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action; and

the word 'prosecution' is not inapt to describe such an action." *Id.* at 575.

LaFranca followed the early case *United States v. Chouteau*, 102 U.S. 603 (1880) which involved a civil suit brought under a statute prohibiting the distillation of liquor without payment of taxes and making violators "liable to a penalty of double the tax imposed" in addition to possible fines and imprisonment. *Id.* at 605. In deciding whether a criminal prosecution and settlement barred a subsequent civil suit for the statutory penalty under the Double Jeopardy Clause, the Court said:

> Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still . . . a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.

102 U.S. at 611.[9]

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[9] This Court has reviewed other nominal tax measures to ascertain whether they are essentially punitive in other cases as well. *See Helwig v. United States*, 188 U.S. 605, 610 (1902) ("whether the statute defines it in terms as a punishment or penalty is not important. If the nature of the provision itself be of that character"); *O'Sullivan v. Felix*, 233 U.S. 318, 324 (1914); *United States v. Constantine*, 296 U.S. 287, 294 (1935) ("If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name"). *Constantine* was distinguished in *United States v. Kahriger*, 345 U.S. 22 (1953), which, in turn, was overruled in part in *Marchetti v. United States*, 390 U.S. 39 (1968).

Montana and Amici attempt to escape judicial review by arguing that taxes frequently serve a "dual function": " '[e]very tax is in some measure regulatory' since 'it interposes an economic impediment to the activity taxed as compared with others not taxed.' *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)." Brief for Solicitor General at 16. They rely on dicta from a footnote in *Bob Jones University v. Simon*, 416 U.S. 725, 741-42 n.12 (1974), in arguing that this Court has abandoned its efforts to distinguish between revenue raising and regulatory taxes on the basis of the primary purpose of the enactment. *Id.*

Their flaw is in their failure to recognize the difference in a tax which may have a "regulatory" aspect and one which has a "punitive" aspect. The Double Jeopardy Clause does not speak to "regulatory" conduct, rather it forbids multiple *punishments* for the same offense. This distinction was recognized in *Sonzinsky*, which refused to strike down a tax with "regulatory" consequences: "Nor is the subject of the tax (federal license tax for firearms dealers) described or treated as criminal by the taxing statute. Compare *United States v. Constantine*, 296 U.S. 287." 300 U.S. at 513.[10] Thus, the fact that this Court may be reluctant to review the purpose of a tax for regulatory features has little to do with the question of whether a "tax" is "punishment" under double jeopardy.

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[10] Although not a tax case, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) this Court recognized the difference between regulatory and penal legislation: "The punitive nature of the sanction here is evident under the test traditionally applied to determine whether an Act of Congress is *penal or regulatory in character*. . . . " *Id.* at 168 (emphasis added).

Most of the "regulatory tax" cases have arisen in the context of constitutional challenges to the exercise of federal legislative power under Article I, § 8 of the United States Constitution. Professor Tribe acknowledges that almost any tax will have "an ancillary regulatory effect. . . . " L. Tribe, *American Constitutional Law*, 319 (2d ed. 1988). He states, however,

> [i]f Congress has authority independent of its taxing power to regulate the taxed subject, this regulatory effect is not constitutionally troublesome. In such cases, even if the tax is plainly regulatory in purpose and effect, it may be upheld under the necessary and proper clause as a means of regulating an activity properly the subject of congressional regulation.

Id.[11] In this context, as Professor Tribe states, a deferential judicial attitude is readily explained:

> [T]he Court's expansive modern interpretation of the commerce clause substantially reduces the likelihood that a tax, even if found to be regulatory, would be held to be beyond congressional power.

Id. at 320.[12]

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[11] For example, as Professor Tribe explains, in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), a federal tax on bank notes issued by state banks was upheld, even though the effect of the tax was to drive such notes out of circulation, since Congress had the power under Article I, § 8 to regulate currency through taxation as well as by other means. Tribe at 319.

[12] For example, the majority in *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969), responded to a dissenting argument that a narcotics tax was not a revenue tax by noting that there was

This is not true when a tax measure poses a double jeopardy threat. Neither Congress nor the states have any ancillary power, like the federal interstate commerce or state police powers, to punish twice for the same offense. The Fifth Amendment commands precisely the opposite.

A similar argument to Montana's was rejected by this Court in *Marchetti v. United States*, 390 U.S. 39 (1968). Prior to *Marchetti*, this Court had upheld a conviction for running a gambling operation without paying a federal excise tax on all wagers. *United States v. Kahriger*, 345 U.S. 22 (1953). Using an analysis similar to Montana's here, the *Kahriger* opinion acknowledged that the tax had a "regulatory effect," "[b]ut regardless of its regulatory effect, the tax produces revenue," and was therefore a valid tax. *Id.* at 28. *Kahriger* further upheld the registration requirements of the wagering tax, citing *Sonzinsky* for the proposition that the registration requirements are supportable " . . . as in aid of a revenue purpose." 345

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independent congressional power to achieve the tax's regulatory results under the commerce clause. Tribe at 320 n.13. When Congress repealed the federal marijuana tax in 1971, the Secretary of Treasury testified in support of the repealing legislation and made this very point:

> The bill under consideration represents a comprehensive system of controls over narcotics, marijuana and dangerous drugs. It would repeal the Title 26 taxes on narcotics and marijuana on the ground that *the Federal role in the control of dangerous substances can be satisfactorily founded on powers other than the taxing power*. The Treasury Department supports this view and advocates the passage of this legislation.

Hearings Before the Committee on Ways and Means, House of Representatives, 91st Cong. 2d Sess. 260 (1970) (emphasis added).

U.S. at 32. *Kahriger* was, however, reversed in part in *Marchetti* where this Court said:

> The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation. . . . The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment.

390 U.S. at 44 (emphasis in the original) (citation omitted). The Court held that the Self-Incrimination Clause was violated. *Id.* at 54.

Thus *Marchetti* made it clear that the Court will rigorously review those features of tax measures which impinge on constitutional rights: "The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. *But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers.*" 390 U.S. at 58 (emphasis added). *Cf. Leary v. United States*, 395 U.S. 6 (1969) (federal marijuana tax and self-incrimination clause); *Grosso v. United States*, 390 U.S. 62 (1968) (federal wagering and occupational taxes and self-incrimination clause); *Haynes v. United States*, 390 U.S. 85 (1968) (registration of firearm and self-incrimination); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (invalidating state poll tax).

The Fifth Amendment's Double Jeopardy Clause commands the same careful scrutiny that is required by its Self-Incrimination Clause. In recognizing the fundamental nature of the right against double jeopardy, this Court said in *Benton v. Maryland*, 395 U.S. 784 (1969):

> The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of autrefoits acquit, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once of the same offence." Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, 355 U.S. 184, 187-188 . . . (1957), "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it

is clearly "fundamental to the American scheme of justice."

395 U.S. at 795-96 (footnotes omitted).

Accordingly, the cases which support deferential judicial review of taxes that may be "regulatory" in nature have no application. Where, as here, fundamental constitutional liberties may be infringed under the guise of a tax, careful review is required.

2. Constitutional Review of Tax Measures for Violation of Double Jeopardy May Not be Defeated Simply Because Taxes May Have a Concomitant Revenue Purpose or Because Separation of Purposes is Difficult.

Montana and Amici further seek to distinguish *Halper* and *Austin* by arguing that a part of the *Halper* standard for determining whether a civil matter is punitive or not, i.e., whether it is solely "compensatory" in purpose, is not applicable to a tax measure. They argue that, with the relatively "rare" exception of user taxes, taxes are generally to raise revenue. Brief for Solicitor General at 13. This argument is not persuasive in light of the concession that punitive measures may be adopted under the guise of a tax.

In any event, Montana's dangerous drug tax is not a "general-revenue" tax. It purports to dedicate the revenues derived from the tax for specific drug-related purposes.[13] Indeed Montana makes this very point in

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[13] *See* MCA § 15-25-122 (one-half of the proceeds to be used for youth evaluation program and chemical abuse after-care programs. The other half is allocated to a special law enforcement assistance account and the Department of Justice for grants to youth courts and to fund chemical abuse assessments and detention of juvenile offenders and facilities separate from adult jails.)

attempting a facial justification of the drug tax as "remedial."

Moreover, this Court is often impelled to review many types of state tax measures for constitutional compliance. Taxes are quite often viewed as "compensatory" in nature, contrary to the argument of the Solicitor General. For example, in assessing a state tax which may impact on interstate commerce, Professor Tribe states:

> The Supreme Court has recognized that the states have a legitimate interest in compensatory taxation of interstate commerce: 'It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business *even interstate business must pay its way.' Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

Tribe at 445 (emphasis added).[14]

The general test applied by this Court over a range of state taxes was set forth in *Complete Auto Transit, Inc. v.*

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[14] In addition to user fee taxes, a variety of state taxes have been reviewed for Commerce Clause, Due Process and Privileges and Immunities compliance. *See, e.g., Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) (manufacturing tax); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (flat fee tax); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) and *Austin v. New Hampshire*, 420 U.S. 656 (1975) (income taxes reviewed on privileges and immunities grounds).

Brady, 430 U.S. 274 (1977). Under *Complete Auto Transit*, a state tax will be reviewed for discriminatory effect under a four-part test, including whether the tax is fairly apportioned and whether the tax is "fairly related to the services or benefits provided by the state." *Id.* at 279.[15] Under this test, a generalized state argument that such state tax is immune from review because it is a general revenue-raising device, will not suffice.[16] The argument will not suffice for the same reason as here – if Court review were denied, discrimination against interstate commerce through state taxes would go unchecked.

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[15] Professor Tribe has commented:

> In general, claims of discriminatory taxation are judged primarily on the basis of the facial characteristics of the taxing statutes; the only economic conclusions reached are those which plainly derive from the structure of the industry taxed. But *Complete Auto Transit* may presage increased judicial willingness to examine specific factual circumstances.

Tribe, at 457.

[16] Montana cites *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981) for the proposition that the amount of general revenue taxes collected from a particular activity need not be reasonably related to the value of the services provided to the activity. The general applicability of the language is questionable, particularly in light of the Court's holding in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). *Commonwealth Edison*, as the Ninth Circuit noted, concerned a tax imposed apart from a criminal conviction and therefore there was no need to assess whether its nature was punitive. 986 F.2d at 1311. While *Commonwealth Edison* involved an interstate commerce clause challenge, the tax was found not to be discriminatory because the rate of tax fell equally on coal bound for in-state consumers as well as out of state consumers (although 90% of the coal was bound for out of state). 453 U.S. at 617-18.

This Court has stated:

> The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral "guise of taxation which produces the excluding or discriminatory effect." *Nippert v. Richmond*, 327 U.S., at 426.

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. at 266, 296 (1987). Moreover, Montana's argument, if accepted by the Court, recognizes no limit to the punitive sanction Montana, or any other government, may impose under the "tax" label in pursuit of a purported remedial purpose. In other words, there is nothing in this argument suggesting that a line be drawn at $100 per ounce, $200 per ounce, $1,000 per ounce, or $10,000 per ounce of dangerous drugs. With each increase in the fine, Montana could assert that the legislature's intent, by increasing the fine, was to raise more general revenue for the operation of government. Such an argument is inconsistent with the Double Jeopardy Clause's proscription of multiple punishment.

Recognizing, as he must, that the Double Jeopardy Clause requires judicial review of tax measures because a measure under the guise of a tax could be punitive, the Solicitor General has a fall-back position. He suggests "two key principles" to assess whether a tax is based on a revenue-raising purpose. Brief for Solicitor General at 7-8. First, if the tax is of "general applicability" (i.e. imposed on both legal and illegal goods), no further inquiry into the punitive nature is warranted. The Solicitor General concedes that the Montana Drug Tax fails this test. Brief for Solicitor General at 7. Therefore he suggests proceeding to a "second" principle – "whether the tax is

of type, and in an amount, that is ordinarily also imposed on legal goods and activities." *Id.*

The Solicitor General then struggles mightily to justify the Montana tax under the second principle, arguing (without any record) based on various fixed-rate taxes. He cites, for example, a proposed cigarette tax increase to 99 cents per pack, a "fixed tax on vaccines ranging from 6 cents to $4.56 per dose," and a "fixed tax on ozone depleting chemicals." *Id.* at 23-24. No pricing information is offered, nor is there expert testimony on elasticity of demand or the relative ability of the applicable goods to absorb such taxes. In short, there is nothing of the "particularized assessment" required by *Halper*.

In fact, as demonstrated in Section II, below, Montana's tax would fail the suggested "second principle." Its feature which requires a tax the "greater of" 10 percent of the assessed market value of the drug, or up to $250 per ounce, as determined by the "aggregate weight" of the substance seized, is unlike any other Montana tax. Also, unlike other taxes, its application and administration is triggered by criminal apprehension. And its resulting rate is plainly excessive. In short, even under the principles suggested by the Solicitor General, the Montana drug tax fails.

Finally, Montana argues that, if this Court decides to review the Montana drug tax for punitive features, it will immerse itself in a "quagmire." Brief for Montana at 32. This Court fully appreciates the difficulties in tax review but it has never shirked from its responsibilities under the Constitution:

> Again we are "asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art I, § 8, of the Federal Constitution." *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495, 496 . . . (1947). [O]ur task is by no means easy; the uneven course of decisions in this field reflects the difficulties of reconciling unrestricted access to the national market with each State's authority to collect its fair share of revenues from interstate commercial activity.
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> * * * *
>
> Although we have described our own decisions in this area as a "quagmire" of judicial responses to specific tax measures, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 . . . (1959), we have steadfastly adhered to the central tenet that the Commerce Clause "by its own force created an area of trade free from interference by the States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 . . . (1977).

Scheiner, 483 U.S. at 268-69, 280. No one ever said that it is an easy process to ensure that government runs in accordance with the Constitution. Both *Halper* and *Austin* recognize the difficulties in assessing civil penalties and civil forfeiture for punitive features. Despite these difficulties, this Court in *Scheiner* and numerous other cases, has engaged in careful review of tax measures for compliance with the Constitution. This careful review is required by the Double Jeopardy Clause. The fact that "bright-line" distinctions are elusive in this area does not warrant casting the Fifth Amendment to the winds.

II. MONTANA'S DANGEROUS DRUG TAX, AS APPLIED TO THE KURTHS, VIOLATES THE DOUBLE JEOPARDY CLAUSE BECAUSE IT AMOUNTS TO A SECOND PUNISHMENT.

A fair analysis of Montana's dangerous drug tax demonstrates that deterrence and retribution are important purposes of the Act.

Before turning to Montana's drug tax, however, it is noteworthy that many courts, including this one, have recognized that drug taxes serve "to punish and deter those in possession of illegal drugs." *Sims v. State Tax Comm'n*, 841 P.2d 6, 13 (Utah 1992). *See Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525, 531 (Ill. 1992) ("the tax imposed by the Act tends to punish or deter those who possess or sell illegal drugs"); *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993) ("Obviously one purpose of the [drug] tax and penalty is to deter the sale of controlled substances. . . . "); *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986) ("the clear intent of [South Dakota's tax on controlled substances and marijuana] is to provide an extra penalty on possessors of controlled substances"); *State v. Berberich*, 811 P.2d 1192, 1200 (Kan. 1991) ("[t]he minutes of the Kansas House and Senate committees show that the primary purpose of the [drug tax] Act was to combat drug usage . . . "); *State v. Durrant*, 769 P.2d 1174, 1181 (Kan. 1989) ("[T]he state concedes in its brief that the primary purpose of the [Kansas drug tax act] is to discourage or eliminate drug dealing"); *Sims v. State Tax Comm'n*, 841 P.2d 6, 15 (Utah 1992) (Stewart, J. concurring in the result) ("the primary purpose of [the] Act is to penalize, not to raise revenue. In effect, the Act imposes criminal penalties for the possession of illegal drugs");

Leary v. United States, 395 U.S. 6, 27 (1969) ("We think the conclusion inescapable that the statute was aimed at bringing to light transgressions of the marihuana laws"); *United States v. Sanchez*, 340 U.S. 42, 43 (1950) (objectives of federal Marijuana Tax Act were, in part to "render extremely difficult the acquisition of marijuana . . . and develop[ ] . . . adequate means of publicizing dealings in marijuana in order to tax and control the traffic effectively"); *Tovar v. Jarecki*, 173 F.2d 449, 451 (7th Cir. 1949) ("We think it quite plain that this [Marijuana Tax Act] is a penal and not a revenue-raising statute").[17]

Similarly, scholars recognize the punitive intent of drug tax statutes. *See, e.g.*, Seidman, *Taxing Controlled Substances*, 6 Journal of State Taxation 257, 257 (Fall 1987) ("This tax [on illegally held drugs] will serve as a deterrent to illegal transfers and use"); *see also* Rudstein, *Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions*, 51-52 (in press) 46 U. of Okla. L. Rev. No. 4 (Winter 1993).

A. A FUNCTIONAL ANALYSIS OF MONTANA'S DRUG TAX SHOWS IT TO BE PUNITIVE.

Looking, as *Halper* commands, at the "character of the actual sanctions imposed on the individual by the machinery of the state," 490 U.S. at 447, the retributive effect of Montana's drug tax is evident in several ways.

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[17] Montana incorrectly argues that *Tovar* was overruled by *United States v. Sanchez*, 340 U.S. 42 (1950). *See* Brief of Montana, pp. 20-21. In fact, *Tovar* was cited with approval in *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978).

First, unlike other taxes, liability for Montana's drug tax is tied directly to the commission of a crime and is conditioned upon the culpability of the "taxpayer." *See* MCA § 15-25-112; A.R.M. 42.34.102(1).[18] This tax does not apply to any person "authorized by state or federal law to possess or store dangerous drugs." MCA § 15-25-112. Moreover, liability for the drug "tax" does not arise – and cannot be paid – until the individual is arrested. *See* A.R.M. 42.34.102(1). At that time, the arresting officer prepares the drug tax return for filing with the state. *Id.* If the arrested "taxpayer" refuses to sign the return, the arresting officer must "certify and submit the form to the department within 72 hours of the arrest." *Id.* Finally, payment of drug taxes may be included "as an integral and contingent portion of any plea agreement" between the "taxpayer" and the county attorney responsible for the criminal prosecution of the "taxpayer." A.R.M. § 42.34.109(1)(d). In fact, at the drug tax trial, the only evidence offered by Montana to support the imposition of the tax were the documents of conviction and sentencing. (Tr. Trans. 2, 86-115, 246-270)

In *Austin* this Court relied upon similar factors in concluding that *in rem* forfeitures of property under the Comprehensive Drug Abuse Prevention and Control Act of 1970 are punitive in nature and, for that reason, subject to the Excessive Fines Clause of the Eighth Amendment. 113 S.Ct. at 2811-2812. The Court noted that forfeiture is

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[18] The liquor "tax" found barred in *United States v. LaFranca*, 282 U.S. 568 (1931) was similar to the Montana dangerous drug tax in that no provision was made for payment of that tax independent of criminal prosecution. 282 U.S. at 571.

tied "directly to the commission of drug offenses," and focuses on the "culpability of the owner" thereby revealing a legislative intent to punish those involved in illegal drug activity. *Id.*

Montana's drug tax statute stands in contrast to the former federal marijuana tax reviewed by this Court in *Sanchez*, because, as noted in *Sanchez*,

> *[t]he tax levied by [26 U.S.C.] § 2590(a)(2) is not conditioned upon the commission of a crime.* The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. *[S]ince his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil* rather than a criminal *sanction.*

340 U.S. at 45 (emphasis added). Thus, had the tax in *Sanchez* been conditioned upon the commission of a crime, had there been a previous criminal conviction, and had a double jeopardy defense been raised, careful review of the drug tax would have been necessary. *See Halper*, 490 U.S. at 447-49.

If, as Montana and Amici argue, Montana's dangerous drug tax were solely for the purpose of raising revenue, it could have been carefully tailored to achieve the purpose of raising revenue without being necessarily linked to a criminal prosecution. For example, the Minnesota dangerous drug tax, Minn. Stat. §§ 297D.01 *et seq.*, provides for the anonymous purchase of tax stamps prior to, and independent of, any criminal prosecution for unlawful possession of dangerous drugs. *See* Minn. Stat. §§ 297D.11 (Payment Due on Possession); 297D.13 (Confidential Nature of Information). In contrast, as explained, it is not possible to pay Montana's drug tax until the

individual is arrested. A.R.M. 42.34.102(1). At that time, the tax and attendant penalties and interest become immediately due and payable, and the burden of proof concerning the legality of possession of the illegal substance shifts from the state to the individual. MCA §§ 15-25-111(1); 15-25-112.

Montana's deterrent purpose is also evident in the excessive rate of the tax. By imposing a substantial tax and penalty for unlawful possession of dangerous drugs, the legislature intends to discourage or deter those in possession of illegal drugs.[19] The clearest evidence of the deterrent purpose of Montana's Drug Tax Act, as noted by the Bankruptcy Judge, is Montana's valuation of the 100 pounds of "shake."[20] (App. to Pet. for Cert. at 49-50, 59; *see also* Pl. Exh. 17 ("Item # 9") and 18)

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[19] *Cf.* K. Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale Law Journal 1795, 1816 n.68 (1992):

> In several early cases the Court took a functional view of monetary sanctions. *See United States v. Constantine*, 296 U.S. 287 (1935) (holding that excise tax grossly disproportionate to normal tax for retail liquor dealers who violate state law constitutes penalty); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922) (holding that "tax" that "clearly involves the idea of punishment for infraction of the law" is penalty); *Helwig v. United States*, 188 U.S. 605 (1903) (holding additional duty imposed for undervalued customs declaration that is greatly in excess of regular duty penal in character).

[20] "Shake" is the street term for the loose parts of the marijuana plants, particularly the stems and leaves, which are of significantly less value than the buds because of their lower THC content. (App. to Pet. for Cert. at 36)

Montana placed a market value for the shake at $200.00 a pound, based on valuations provided by the Federal Drug Enforcement Administration. (App. to Pet. for Cert. at 50; Pl. Exh. 17 and 18; Tr. Trans. at 58-61, 131-132, 140) Yet Montana taxed the shake at $100.00 per ounce ($1,600 per pound), thus taxing the product at eight times its market value. (*Id.*) This rate of taxation is clearly confiscatory, and intended to be: its obvious purpose is to wipe out illegal drug traffic. (*Cf.* Tr. Trans. at 61-64)

Mr. McGee, the Montana official responsible for the assessments in this case, testified that in his long tenure with D.O.R. he had never administered any tax which is eight times greater than the market value of the product:

> Q. [Y]ou've been in taxes in the Department of Revenue for how many years, Mr. McGee?
>
> A. (McGee) Twenty years.
>
> Q. You've worked with what kinds of areas and what kinds of taxes?
>
> A. All kinds.
>
> • • •
>
> Q. *You've never encountered in any other area of Montana taxation a tax which is eight times greater than the market value of the product taxed, have you?*
>
> A. *No.*

(Tr. Trans. at 61) (emphasis added) McGee also conceded that a farmer, taxed at that confiscatory rate, would not stay in business very long:[21]

> Q. The effect of that tax really is to discourage the kind of activity, that is, marijuana growing, that we're talking about in this case.
>
> A. I don't know what the effect – what the intent of the law was because I was not in any of the legislature hearings. *I know that that probably has the effect*, but whether that was the intent of the legislature or not, I don't know.

(Tr. Trans. at 64) (emphasis added)

The bankruptcy court properly determined that the dangerous drug tax act promotes the traditional aims of punishment – retribution and deterrence – because:

> [1] the tax applies to behavior which is already a crime, [2] the tax allows for sanctions by restraint of Debtors' property, [3] the tax requires a finding of illegal possession of dangerous drugs and therefore requires a finding of *scienter*, [4] the tax will promote elimination of illegal drug possession, and [5] the tax appears excessive in relation to the alternate purpose

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[21] Mr. McGee also testified:

> Q. In fact it would be the case, wouldn't it, that if you had a farmer out there growing a product and every year when the product came to harvest he was taxed eight times the market value of that product, that farmer wouldn't stay in business very long, would he?
>
> A. (McGee) I don't imagine he would.

(Tr. Trans. at 61-62)

> assigned, especially in the absence of any record developed by the State as to societal costs. Finally, [6] the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report. *All these aspects of the Drug Tax Act lead to the inescapable conclusion that it has deterrence and punishment as its purpose.*

(App. to Pet. for Cert. 59 (emphasis added))

Montana argues that "the Montana Tax is a straightforward excise tax[,]" Brief for Montana at 26, and "is administered like other Montana taxes." *Id.* at 16. Not so. No other Montana tax provides for a tax rate that is the "greater of" a fixed amount, as determined by the legislature, or 10% of the market value of the property, as determined by the department of revenue. *See e.g.*, MCA §§ 16-11-111, *et seq.* (taxation of tobacco); 16-1-401, *et seq.* (taxation of liquor); 15-6-133-134 (agricultural taxation). Thus it can hardly be classified as a typical "excise tax." Moreover, if this argument were accepted there would be no limit on the amount of taxes Montana could impose – it could raise the marijuana tax to $1,000 per ounce or $10,000 per ounce and still not be punitive.

Montana also argues that the Court sustained a $100 per ounce tax in *United States v. Sanchez*, 340 U.S. 42 (1950). *Sanchez* did not involve a double jeopardy issue. If it had, application of the tax would have failed because this Court had no trouble determining that the federal Marijuana Tax Act involved there was in part penal in nature; noting the two objectives of Congress; the first to raise revenue

> and, at the same time render extremely difficult the acquisition of marijuana by persons who desire it for illicit uses and, second, the development of an adequate means of publicizing dealings in marijuana in order to tax and control the traffic effectively. S. Rep. No. 900, 75th Cong. 1st Sess. p. 3. . . .

340 U.S. at 43.

Montana cites the rather spartan legislative history in support of its argument that the Montana drug tax is a bona fide tax.[22] A similar argument was made by the government in *Halper*, where it argued that the nature of a sanction is a matter of statutory construction, and statutory construction is determined by legislative intent. 490 U.S. at 447. The *Halper* opinion stated that "this abstract approach" has been followed when determining whether certain procedural protections should apply to a nominally civil proceeding (*see United States v. Ward*, 448 U.S. 242, 248-51 (1980)).

> But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, *the approach is not well suited to the context of*

[22] Montana failed, however, to provide the Court with the entire legislative history as an appendix to its brief. Montana did not include "Exhibit 4" referred to by several legislators. This exhibit included an article from the *Wall Street Journal* discussing the Minnesota drug tax statute and states in part: "Buyers are guaranteed anonymity as a constitutional safeguard, but *enforcers see the tax as a tool for squeezing pushers.*" *Id.*, Dec. 10, 1986 at 1 (emphasis added).

> *the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.* This constitutional protection is intrinsically personal. *Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.*

Halper, 490 U.S. at 447 (emphasis added) (citation omitted).[23]

In short, the unique factors of the Drug Tax Act make it clear that Montana's drug tax does not solely serve a compensatory or remedial goal. Montana's drug tax is punitive and its imposition in this case violates the Double Jeopardy Clause.[24]

[23] This is not to say that legislative intent should be ignored when it clearly establishes the penal nature of a measure. For example, in *Leary v. United States*, 395 U.S. 6 (1969), this Court reviewed both the mechanics and legislative history of the Marijuana Tax Act in determining that the Act violated the Fifth Amendment prohibition against self-incrimination. *Id.* at 22-27. In concluding that the Marijuana Tax Act "was aimed at bringing to light transgressions of the marihuana laws," 395 U.S. at 27, the Court relied upon testimony from the Treasury Department's General Counsel that purposes of the Act were to "discourage the current and widespread use of the drug by smokers and drug addicts," "to render extremely difficult the acquisition of marijuana for illicit uses," "to prevent transfers to persons who use marijuana for undesirable purposes," and "through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses." 395 U.S. at 22-23 (footnotes omitted).

[24] Montana relies in part on the Montana Supreme Court's rejection of a double jeopardy challenge to the Montana Drug Tax in *Sorensen v. State Dep't of Revenue*, 836 P.2d 29 (Mont. 1992). The Ninth Circuit correctly rejected *Sorensen* because it "ignores

B. MONTANA FAILED TO JUSTIFY ITS DRUG TAX WITH ANY KIND OF PARTICULARIZED ASSESSMENT, OR ACCOUNTING, AS REQUIRED BY *HALPER*.

Where, as here, a defendant has previously sustained a criminal penalty and the civil sanction sought in the second proceeding appears punitive, the defendant is entitled to an accounting of the government's damages and costs. *Halper*, 490 U.S. at 449. Respondents recognize that such accounting cannot be absolutely precise. *Halper* appreciates the difficulty, instructing that "the process of affixing a sanction that compensates the Government for all of its costs inevitably involves an element of rough justice." 490 U.S. at 449. Montana, however, did not even make a passing attempt to justify the tax as proportional.

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the particularized double jeopardy inquiry required by *Halper*." 986 F.2d at 1312 n.2. Apart from that fundamental flaw, *Sorensen* applied the wrong legal analysis when it relied upon *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and *United States v. Ward*, 448 U.S. 242 (1980):

> The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. *See Mendoza-Martinez*, 372 U.S. at 167, 184 . . . ; *Ward*, 448 U.S. at 248. . . . In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in *Mendoza-Martinez*, and *Ward*. *See, e.g., United States v. Halper*, 490 U.S. 435, 447 . . . (1989).

Austin, 113 S.Ct. at 2806 n.6; *cf. Sorensen*, 836 P.2d at 31-32. Accordingly, the *Sorensen* opinion offers little guidance to this Court in assessing whether the Montana Drug Tax is punitive under the Double Jeopardy Clause.

Thus, as the courts below found, there is no evidence in the record on which a remedial finding can be based.[25]

Montana and Amici argue that such an accounting is not required because the second sanction is a "tax" devoted to the remedial goal of compensating the government for the costs of drug abuse in society. To this end, Montana and the Solicitor General argue that this Court

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[25] This failure of proof is not excusable. The bankruptcy court rejected Kurths' *Halper*-based summary judgment motion because it agreed with Montana's opposition that "[a]ssuming the drug tax is subject to analysis under the *Halper* criteria, that case does not permit summary judgment based on the record now before the Court. [T]here is simply no record to apply the *Halper* criteria to this case." (App. to Pet. for Cert. at 56) At trial, however, Montana failed to introduce any evidence that the drug tax sought to be levied against the Kurths was reasonably related to the goal of compensating the government. The Bankruptcy Court said:

> This latter statement of D.O.R. is mere hyperbole, since the D.O.R. failed to introduce one scintilla of evidence as to the cost of the above government programs or costs of law enforcement incurred to combat illegal drug activity. Moreover, deputy sheriff Saville was specifically asked by plaintiffs' counsel if the witness had made *any* (even a rough) estimate as to the cost to the state on prosecution of the Kurth criminal investigations, arrest, and conviction and he replied none was made. Consequently, the D.O.R. faced with the *Halper* issue, which was raised at the Motion for Summary Judgment stage, *put forth no effort* at the trial stage, *when it had an opportunity to do so*, to show the tax is "rationally related to the goal of making the government whole."

(App. to Pet. for Cert. at 55) (emphasis added)

can simply take judicial notice of the cost of drug abuse on society.

The governments' argument is inconsistent with the "intrinsically personal" protection of the Double Jeopardy Clause. *Halper*, 490 U.S. at 447. Under *Halper* the focus of the inquiry is whether "the sanction *as applied in the individual case*, serves the goals of punishment." *Halper*, 490 U.S. at 448 (emphasis added). No doubt the cost to society of Medicare and Medicaid fraud (the reason for the Federal Civil False Claims Act at issue in *Halper*) is high:

> The costs which fraud has placed upon our nation's Medicare and Medicaid programs have been severe. *[E]ach fraudulent claim filed exacts an immense toll from society.*

Mayers v. United States Dep't of Health & Human Servs., 806 F.2d 995, 999 (11th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987) (emphasis added). Notwithstanding the "immense toll" fraudulent health care claims exact from society, this Court in *Halper* limited the government's recovery to its "actual costs arising from Halper's fraud. . . . " 490 U.S. at 452. Halper was not required to shoulder the entire cost of health care fraud in this country, which, as the Eleventh Circuit noted is immense.

This Court in *Austin* rejected an identical argument advanced by the United States. There the government argued that forfeiture is not punitive, in part, because "[t]he forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from

the drug trade." 113 S.Ct. at 2811. Applying the *Halper* standard, the Court rejected this argument because forfeiture does not *solely* serve a remedial purpose. *Id.* at 2812. The Court, as in *Halper*, focused on the Government's *"actual costs,"* not the societal cost of drug abuse, when it made a comparative analysis of forfeitures in the context of the Excessive Fines Clause of the Constitution. *See Austin*, 113 S.Ct. at 2812 n.14 (emphasis added).

In sum, the bankruptcy court carefully followed the double jeopardy principles announced by this Court in *Halper*. On the basis of the evidence before it, the court properly found that Montana's tax simply punished the Kurths a second time for unlawful possession of marijuana. *Halper*, 490 U.S. at 450 ("We must leave to the trial court the discretion to determine on the basis of [the Government's] accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment").

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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December, 1993

INCOME AND MISCELLANEOUS TAX
Sub-Chapter 1
Dangerous Drug Tax Act

42.34.101 DEFINITIONS As used in this rule, unless context requires otherwise, the following definitions apply:

(1) "Criminal justice agency" as defined in 44-5-103, MCA.

(2) "Market value", is the value of the substance at the time of confiscation or report and may vary substantially throughout the state contingent upon consumer demand.

(3) "Public criminal justice information" as defined in 44-5-103, MCA. (History: Sec. 15-25-113 MCA; *IMP*, Sec. 15-25-111 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.102 FILING OF RETURNS - DANGEROUS DRUG INFORMATION REPORT (1) Every person possessing or storing dangerous drugs, and not authorized to do so by law, shall file a return with the department. This return shall contain the type, quantity, and market value of such dangerous drugs in their possession or being stored by them. This return shall be filed within 72 hours of their arrest.

(2) The department shall review such return and notify the taxpayer of the tax assessment within 30 days.

(3) At the time of arrest law enforcement personnel shall complete the dangerous drug information report as required by the department and afford the taxpayer an

opportunity to sign it. Should the taxpayer refuse to sign the form, the refusal shall be noted on the form, and the law enforcement officer shall certify and submit the form to the department within 72 hours of the arrest.

(4) A copy of the completed form may be retained in the file of the criminal justice agency for proof of compliance, and a copy shall be provided to the taxpayer.

(5) The form and content of the dangerous drug information report shall include: taxpayer name, address, social security number, arrest or booking number and the type and quantity of the dangerous drugs possessed or stored. (History: Sec. 15-25-113 MCA; *IMP*, Sec. 15-25-111 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.103 NOTICE OF ASSESSMENT - HEARING - LIEN (1) A notice of assessment is immediately due and payable.

(2) The taxpayer has the right to request a hearing on the matter of the tax. Such request must be submitted in writing within 30 days from the date of the assessment and shall specify the specific issues being contested. The hearing if requested, shall be conducted in accordance with the provisions and requirements of section 15-1-705, MCA. In most cases, one hearing will be held to consider both the assessment and the warrant of distraint.

(3) The associated criminal nature of assessments under this act is considered to be cause for emergency issuance of the warrant for distraint under the provisions of 15-1-703(1)(a), MCA. (History: Sec. 15-25-111 MCA; *IMP*, Sec. 15-25-113 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.104 CREDITS AND REFUNDS - PROCEDURES (1) If the department discovers that the amount of the tax collected is in excess of the amount due or that any portion of the penalty or interest was erroneously or illegally collected or upon claim duly filed by the taxpayer or upon final judgment of a court, the amount of any overpayment shall be credited against any other tax, penalty or interest due the department from the taxpayer and the balance of any excess shall be refunded to such taxpayer.

(2) Within 6 months after a claim is filed, the department shall examine a claim for refund and if such claim is approved shall issue a credit or refund to the taxpayer within 60 days of the approval; if the claim is disallowed, the department shall notify the taxpayer and grant a hearing thereon upon proper application from the taxpayer.

(3) Except as herein provided, interest shall be allowed on overpayments at the same rate as charged on delinquent taxes from either the due date of the tax or the date of the overpayment (whichever is later) to the date of the department approval of the refund or credit of the overpayment, unless:

(a) the overpayment is refunded within 6 months of the date due, or

(b) the overpayment or refund is less than $1.

(4) An overpayment not made incident to a bona-fide and orderly discharge of an actual tax liability or one reasonably assumed to be imposed by this rule shall not be considered subject to interest refund. (History: Sec.

15-25-113 MCA; *IMP,* Secs. 15-1-503 and 15-25-111 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.105 ASSESSMENT NOT CONTINGENT UPON CONVICTION (1) A criminal conviction for drug related charges or other charges is not a prerequisite for the tax. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-111 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.106 RESIDENCY NOT CONSIDERED FACTOR (1) Any person possessing or storing dangerous drugs within or transporting them through the jurisdictional boundaries of Montana is subject to the provisions of this act, whether resident or nonresident. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-111 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.107 CONFIDENTIALITY OF TAX RECORDS (1) The department will restrict the release of any information required to administer this act when the law requires confidentiality by the originating criminal justice agency. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-113 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.108 INVESTIGATION (1) The department may examine or inspect the public criminal justice information files of any criminal justice agency, or taxpayer records to administer this tax. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-113 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.109 ASSISTANCE OF COURTS - COUNTY ATTORNEY (1) Upon their concurrence the department may seek the assistance of any court of competent

jurisdiction, officer of the court or county attorney in collection of any assessment under the provisions of this act by:

(a) requesting a report for each taxpayer or person subject to drug related charges within the court's jurisdiction, which shall include the amount of any fines assessed, paid, waived or abated and the terms stipulated for payment of such fines. Such report may be submitted to the department monthly.

(b) requesting notification from the court of the conviction or sentencing of an individual subject to an assessment under the provisions of this act.

(c) requesting that upon notification of any assessment the court add the assessment to the amount of fines or forfeitures levied against the taxpayer and collected in like manner as such fines and forfeitures.

(d) requesting that upon notification of any assessment from the department the county attorney include payment of such assessment as an integral and contingent portion of any plea bargain agreement with the taxpayer. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-113 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.110 CLOSING AGREEMENTS (1) The director of revenue or any person authorized in writing by him may enter into an agreement with any person relating to the liability of such person in respect to the tax imposed by this act for any taxable period. Any such agreement shall constitute the department's final and conclusive determination of the tax due under the Dangerous Drug Tax Act. (History: Sec. 15-25-113 MCA; *IMP,*

Sec. 15-25-113 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)

No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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December 1993

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ARGUMENT

A. Introduction

The pivotal question in this case is whether Montana's Tax is a tax. The double jeopardy provision of the Fifth Amendment comes into play only if Montana seeks to punish the Taxpayers twice for the same offense. If, and only if, the Montana Tax is a sanction can the Court's decision in *United States v. Halper,* 490 U.S. 435 (1989) be applied to the tax assessment at issue.

The case involves a specific tax – a tax of $100 an ounce on the possession of marijuana. The tax assessment at issue is $181,100 for the possession and storage of 1,811 ounces of marijuana.[1]

---

[1] The contention that imposition of the tax against all the Taxpayers was not proved at the trial is without merit. For example, the Agreed Facts in the Pre-Trial Order stated: "The Plaintiffs, in December, 1985 or January, 1986 began growing and selling marijuana." (Pet. App. 29) Also see Agreed Fact 15. (Pet. App. 29-30.) The Plaintiffs included Richard M. Kurth, Judith M. Kurth, Douglas M. Kurth, Rhonda I. Kurth, Clayton H. Halley, Cindy K. Halley, Kurth-Halley Cattle Company, and Kurth Ranch.

The evidence offered at the trial to support imposition of the tax on all the Taxpayers came from their testimony particularly that of Richard Kurth. (Tr. p. 74). His testimony was supported by depositions of other family members which were introduced into evidence. For example, Judith Kurth testified:

> Q. (B. McGinnis) Were you aware, Mrs. Kurth, that there was a marijuana growing operation conducted on that property?
>
> A. (J. Kurth) Yes.
>
> Q. (B. McGinnis) And were you involved with the growing operation?
>
> A. (J. Kurth) Yes, I was.

The Taxpayers' assertion that the record does not support this assessment and the Department's description of their marijuana operation and sales is without merit.[2]

(Judith Kurth Dep. p. 60) The evidence included a video tape of the marijuana operation (Exhibit DD).

That evidence supports imposition of the tax against all members of the Kurth family, the Kurth-Halley Cattle Company and the Kurth Ranch. This evidence supported the bankruptcy court's finding that the Department legally imposed a tax of $181,100 against all the Taxpayers. (Pet. App. 58). The Taxpayers did not cross-appeal those findings.

The remaining respondent, Robert Drummond, the bankruptcy trustee is not a party since the bankruptcy trustee accedes to the property rights of the Debtors and not to the individual constitutional rights of the Debtors. 11 U.S.C. § 110(a) and § 541

[2] For example, at the trial, this exchange took place between Richard Kurth and one of the Taxpayers' attorneys, Mr. Gallik:

> Q. (Gallik): At what quantities would you typically sell the bud?
>
> A. (Kurth): I'm going to say anywhere from three to I think at one point I sold as much as eight pounds to him. . . .
>
> Q. (Gallik): How much money did you receive for a pound of marijuana?
>
> A. (Kurth): When we first started, we got $1,000 per pound. And as the thing progressed, the second man, Dave Eggebrecht, informed us that was not a fair price to us, and the price moved up from $1,000 gradually up to where the last six months we got $1,800 a pound for bud.

(Tr. at 80.)

B. Montana's Tax Does Not Require Arrest Or Conviction.

The Taxpayers cite Mont. Code Ann. § 15-25-112 (1987) for the proposition that "liability for Montana's drug tax is tied directly to the commission of a crime and is conditioned upon the culpability of the 'taxpayer'." (Taxpayers' Brief at 34.) Montana Code Annotated § 15-25-112 (1987) states:

> The tax imposed pursuant to 15-25-111 does not apply to any person authorized by state or federal law to possess or store dangerous drugs. The burden of proof of an exemption from 15-25-111 is on the person claiming it.

This statute merely states that the tax is on illegal activity. The Department of Revenue has never denied that the tax is on an illegal activity. However, not every unauthorized possession of marijuana results in arrest let alone conviction.[3]

The Taxpayers cite Mont. Admin. R. 42.34.102(1) for the same proposition and for the proposition that "liability for the drug 'tax' does not arise – and cannot be paid – until the individual is arrested." (Taxpayers' Brief

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[3] A "person" is defined as "an individual, firm, association, corporation, partnership, or any other group or combination acting as a unit." Mont. Code Ann. § 15-25-102 (1987). Therefore, the tax can be applied to "persons" which are not arrested or charged with criminal possession of drugs, e.g., the Kurth-Halley Cattle Co., a partnership. If Kurth Ranch and Kurth-Halley Cattle Company were corporations, those corporations would be liable for the tax.

at 34.) This is not true. Montana Administrative Rule 42.34.102(1) states:

> Every person possessing or storing dangerous drugs, and not authorized to do so by law, shall file a return with the department. This return shall contain the type, quantity, and market value of such dangerous drugs in their possession or being stored by them. This return shall be filed within 72 hours of their arrest.

(Taxpayer App. p. 1). This rule does not require an arrest or a conviction in order to make a person liable for the tax. The rule acknowledges the tax is on an illegal activity and indicates that if an arrest occurs, a return must be filed. This is simply a common sense approach to collecting a tax on an illegal activity.

The Taxpayers' cite Mont. Admin. R. 42.34.109(1)(d) for the proposition that the drug taxes "may be included 'as an integral and contingent portion of any plea agreement' between the 'taxpayer' and the county attorney responsible for the criminal prosecution of the 'taxpayer.' " Taxpayers Brief at 34. That rule provides:

> (1) Upon their concurrence the department may seek the assistance of any court of competent jurisdiction, officer of the court or county attorney in collection of any assessment under the provision of this act by:
>
> . . .
>
> (d) requesting that upon notification of any assessment from the department the county attorney include payment of such assessment as an integral and contingent portion of any plea bargain agreement with the taxpayer.

Again, this rule merely provides a practical approach to the collection of the tax. The rule does not indicate that an arrest or conviction is required for a person to be liable for the tax.

Finally, the Taxpayers failed to call to the Court's attention one of the Administrative Rules for the Drug Tax, Mont. Admin. R. 42.34.105 which states: "(1) A criminal conviction for drug related charges or other charges is not a prerequisite for the tax." (Taxpayer App. 4)

C. The *LaFranca* Decision is Not Controlling – the Decision is Not Precedent in Light of Subsequent Decisions and did not involve Double Jeopardy.

The Taxpayers argue that this case is controlled by *United States v. LaFranca*, 282 U.S. 568 (1931). In *LaFranca* the Court stated:

> A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.

Id. at 572. No one has contested this principle.

However, the decision in *LaFranca* that pursuant to *Lipke v. Lederer*, 259 U.S. 557 (1922) "the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law" is of doubtful

value as precedent. *LaFranca*, 282 U.S. at 572. In *Bob Jones University v. Simon*, 416 U.S. 725, 743 n.12 (1974), the Court abandoned the *Lipke* analysis on which *LaFranca* was based:

> In support of its argument that this case does not involve a "tax" within the meaning of § 7421(a), petitioner cites such cases as *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922) (tax on unregulated sales of commodities futures) and *Lipke v. Lederer*, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1922) (tax on unlawful sales of liquor). It is true that the Court in those cases drew what it saw at the time as distinctions between regulatory and revenue raising taxes. *But the Court has subsequently abandoned such distinctions.* E.g., *Sonzinsky v. United States*, 300 U.S. 554, 81 L.Ed. 772 (1937). (Emphasis supplied.)

The *LaFranca* decision is further placed in question by the Court's decision in *Helvering v. Mitchell*, 303 U.S. 391 (1938). In that case, based on *LaFranca*, the circuit court held that the imposition of an additional 50% assessment of $364,354.92 against a taxpayer because he committed fraud was barred under double jeopardy because of a prior acquittal on criminal charges involving the same fraud. The tax and 50% fraud assessment totalled $1,093,064.78. The Court reversed the circuit court and affirmed the additional assessment. In *Mitchell* the Court rejected double jeopardy arguments similar to those raised by the Taxpayers in this case. *Id.* at 393. *Mitchell* also demonstrates that if the sanction is statutorily

proportional to the sanctioned activity there is no double jeopardy difficulty.

As the Court noted in *Halper*, *LaFranca* did not even address any double jeopardy question.[4] Rather the Court based the decision in construction of the statute at issue.[5] Thus, contrary to Taxpayers' assertions on page 7 of their brief, in *LaFranca* the Court did not reject "the government's argument that the second measure was a civil tax rather than punishment under double jeopardy."

D. The Taxpayer Ignored the Careful Statutory Analysis of the Tax by the Montana Supreme Court – in Contrast the Circuit Court failed to analyze the Tax.

No one is arguing that labeling a statute a "tax" immunizes a statute from the Court's review just as alleging a tax is a "penalty" does not make it a penalty. The Montana Supreme Court in *Sorenson v. State Department of Revenue*, 836 P.2d 29 (Mont. 1992) certainly did not view the Montana Tax as "immune from judicial review." Instead, it conducted full analysis of the statute prior to concluding it was a tax.[6]

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[4] "See also *United States v. LaFranca*, 282 U.S. 568, 573 (1931) (asking, but not answering whether a penalty assessed in a civil proceeding may nonetheless constitute punishment for the purposes of double jeopardy analysis)." *Halper*, 490 U.S. at 443.

[5] Also see *Wainer v. United States*, 299 U.S. 92 (1936) which was decided after *LaFranca*. In that case the Court upheld a criminal conviction for failure to pay the special tax at issue in *LaFranca*.

[6] The Taxpayers faulted the Montana Supreme Court's *Sorenson* decision for using "the wrong legal analysis when it

In contrast, the circuit court held that *Halper* requires a determination of the relationship between the tax imposed by the state and damages suffered by the government without analyzing whether or not the tax assessment was a civil penalty, or even whether it was remedial. Instead, the circuit court placed the burden on the state to demonstrate that the tax assessment was proportional to the "actual damages and costs." (Pet. App. at 11). The court short-circuited the *Halper* analysis by assuming that a tax assessment is a civil sanction, and further, that requiring a person to pay over $181,000 was so grossly disproportionate that it required a finding that the tax was punitive.

The circuit court never considered the statute itself, the expressed legislative purpose of the tax statute, the legislative history, or the history of similar federal taxes but only looked to the size of the assessment. The circuit court ignored the fact that the assessment was large because the Taxpayers had a large amount of marijuana – the tax was proportional to the amount of the taxed commodity. The circuit court apparently adopted the position advocated by the Taxpayer that an ostensibly large tax assessment undermines all other factors including any remedial purpose. Therefore, its opinion conflicts with numerous decisions by this Court.

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relied upon *Kennedy v. Mendoza-Martinez*, 373 U.S. 144 (1963) and *United States v. Ward*, 448 U.S. 242 (1980). Taxpayers' Brief at 42. Yet, the Taxpayers cite with approval the analysis of the bankruptcy court which was based on the same *Kennedy v. Mendoza-Martinez* test. Taxpayers's Brief at 38-39. (Pet. App. at 54 and 58-59)

E. The Purpose of the Montana Tax is Neither Deterrence Nor Retribution.

The Montana Tax itself, the preamble, and the legislative history show no indication that the tax had a retributive or deterrent purpose nor can such purposes be implied. It is inconceivable that anyone would believe that drug dealers who are not deterred by the severe federal and state criminal penalties would be deterred by a tax on marijuana. See *Harmelin v. Michigan*, 115 L. Ed. 2d 836 (1991) (Life imprisonment for possession of cocaine.) The Taxpayers planned to net over a million dollars a year from growing marijuana.[7] A tax of $181,000 does not seem unreasonable in light of these profits.

The Montana Tax, the preamble, and the legislative history do not indicate any retributive intent. The intent of the tax is to raise money for governmental services closely linked to the taxed activity.

Contrary to the Taxpayers' argument the fact that the Montana Tax funds specific governmental programs related to drugs does not change its fundamental character as a tax. There are numerous excise taxes with revenues dedicated to specific programs associated with the taxed commodity, e.g., the federal excise tax on coal

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[7] Q. (Van Tricht) How much did you owe the bank? . . .

A. (R. Kurth) Between the two banks, Norwest Bank and the Land Bank, about $2 million.

Q. (Van Tricht) You planned to pay them off with the production of marijuana within two years?

A. (R. Kurth) Yes.

Tr. p. 107.

funds the black lung disability program (26 U.S.C. § 4121), the excise tax on aviation fuel funds airport construction (26 U.S.C. § 4091), and the federal excise tax on chemicals funds environmental clean up ("the superfund") (26 U.S.C. § 4611). Those federal taxes are just as much a tax as the federal income tax which raises revenue for general governmental purposes.

As the Court noted in *Halper*, whether a civil penalty is a punishment cannot "be determined from the defendant's perspective." "On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment." *Id.* 490 U.S. 447 n. 7. The Montana Tax is $100 an ounce; a level approved by federal courts in the cases previously cited. It is not $1,000 an ounce or $10,000 an ounce. The Court does not address "hypothetical or contingent questions." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945). The assertion that a tax can be raised so high as to be unconstitutional does not make an existing much lower tax unconstitutional.

F. The Court has Repeatedly Approved Excise Taxes on Illegal Products.

The Taxpayers fuse the two issues of whether the Montana Tax is truly a tax or a sanction and whether, if a sanction, the tax is punitive rather than remedial. The first issue is whether the Montana Tax is a sanction. The second issue is if the tax is a sanction does it constitute a punishment for the purposes of the Double Jeopardy Clause. The Court's decision in *Halper* makes it clear that

all sanctions are not punishment under the Double Jeopardy Clause. *Halper*, 490 U.S. at 446.

The Taxpayers wrongly imply that merely taxing a criminal activity automatically makes a tax a sanction. The Court has approved taxing illegal activity at least since the *License Tax Cases*, 5 Wall 462 (1866). That case involved a tax on lotteries which at that time was an illegal activity. This Court has approved taxes conditioned on illegal activities. For example, the Court approved the taxation of intoxicating spirits during prohibition. In *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 328 (1926), the Court held:

> The claimant contends that the so-called tax on illicitly distilled spirits theretofore imposed ceased to be a tax and became in law a penalty, when the enactment of the National Prohibition Act changed the purpose of the tax from raising revenue to preventing manufacture, sale, and transportation; and that to enforce such penalty by forfeiture of the property rights of innocent third parties would be a denial of due process of law. It is true that the use of the word "tax" in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such. But the imposition here in question is not of that character. *A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable.* (Emphasis supplied.)

Also included among the approved taxes on illegal activity was a federal tax on wagering, an illegal activity at the time. See *United States v. Kahriger,* 345 U.S. 22 (1954). The tax was conditioned on commission of a crime.

Contrary to the Taxpayers' contention, *Marchetti v. United States,* 390 U.S. 38 (1968) and related cases do not support their arguments. Taxpayers' Brief, pp. 23-24. While the Court ruled that criminal prosecution for failure to comply with the wagering tax could be barred by the privilege against self-incrimination, the Court clearly stated that barring criminal prosecution for failure to comply with the tax in no way invalidated the tax itself. For example, in *Marchetti* the Court held:

> *We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible;* we hold only that those who properly assert the constitutional privilege as to those provisions may not be criminally punished for failure to comply with their requirements.

Id. 390 U.S. at 60 (emphasis added).

The Taxpayers apparently view as anomalies the Court's decisions in *United States v. Sanchez,* 340 U.S. 42 (1950) and *Buie v. United States,* 396 U.S. 87 (1969) holding that the Marijuana Tax Act, 26 U.S.C § 4741 et seq. (1954), was a true tax. This view ignores substantial precedent from this Court on the Harrison Narcotic Drug Act of 1914, 38 Stat. 785; 6 U.S. Comp. Stats. 1916, § 6287g. That act placed excise taxes on persons who dealt with opium and coca leaves and their derivatives. For example, it imposed a $300 a pound tax on the manufacture of opium

for smoking purposes. The Harrison Narcotic Drug Act survived a long series of challenges before the Court on various constitutional grounds. See, e.g., *United States v. Jin Fuey Moy,* 241 U.S. 394 (1916); *United States v. Doremous,* 249 U.S. 86 (1919); *Linder v. United States,* 268 U.S. 5 (1925); *United States v. Daugherty,* 269 U.S. 360 (1926); *Nigro v. United States,* 276 U.S. 332 (1928).

In *Jin Fuey Moy* the Court rejected a challenge that the narcotic tax is not a true revenue measure but an unconstitutional exercise of police powers reserved to the states. In *Linder* the Court repeated that holding: "[t]he Narcotic Law is essentially a revenue measure and its provisions must be reasonably applied with the primary view of enforcing the special tax." *Linder,* 268 U.S. at 22. Also see, *United States v. Balint,* 258 U.S. 250 (1922).

The Court also has ruled that governments may tax illegal activity and income from illegal activity even though that income may be forfeited.[8] *James v. United States,* 366 U.S. 213 (1961).

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[8] Nor is it an aberration to tax illegal conduct higher than legal conduct. For example, the federal government currently taxes illegal gambling at two percent of receipts and legal waging at one-quarter of one percent. 26 U.S.C. § 4401(a). See *United States v. Hallmark,* 911 F.2d 399 (10th Cir. 1990) which upheld the tax.

G. The Rate of the Montana Tax and Its Alleged Economic Effect Does Not Make It a Punishment

The Taxpayers essentially argue that the mere size of the tax assessment makes it a penalty.[9] However, the Court has never accepted that argument. The premise that a tax is invalid if so excessive as to bring about the destruction of a particular business has been "uniformly rejected as furnishing no juridical ground for striking down a taxing act." *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). Also see, *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974) and *Alaska Fish Co. v. Smith*, 235 U.S. 44 (1921) to the same effect.

In *Sonzinsky v. United States*, 300 U.S. 506 (1936) the Court approved a tax of $200 on each transfer of a sawed off shotgun, a machine gun, or a silencer despite the fact some of those items sold for as little as $10 in the 1930's.

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[9] The Bankruptcy Court apparently found the Montana Drug Tax excessive in relation to the wholesale price for a pound of "shake." As was noted other federal courts have not found a tax of $100 an ounce so excessive as make the tax a penalty and not a tax. Further, the record shows that the price of shake at retail (1/4 ounce) quantities was more than $100 per ounce. See the "Trans-High Market Quotations" in Tr. Exhs. AA3, AA4, and AA5.

Deputy Saville testified that there was a common simple device, a "marygin," being used by marijuana smokers which allows the user to upgrade the marijuana by separating the stems and seeds from the leaves. Tr. at 253-254.

The Taxpayers used the "shake" to make marijuana oil, a product with a much higher value. Tr. at 78.

Id. at 509. That is, the Court approved a tax 20 times the value of the taxed commodity.[10]

High excise taxes at or over the costs of the commodities have existed since the founding of the nation.[11] The current federal excise tax on distilled spirits is $13.50 per proof gallon. ($10.50 for a gallon of 80 proof (40%) alcohol.) 27 C.F.R. part 19. Raw grain alcohol (95%) currently sells at wholesale for $1.01 to $1.15 per gallon.[12] The Montana and federal excise taxes on cigarettes and cigars greatly exceeds the value of the tobacco in those products.[13]

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[10] The Court held: "[w]e are not free to speculate as to the motives which moved the Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed." *Sonzinsky*, 300 U.S. at 514.

[11] For example, the Excise Act of 1791, 1 U.S. Stat. at Large, 199, enacted a whiskey excise tax of 30 cents per gallon. This tax might seem infinitesimal today until one realizes that a gallon of whiskey in the early 1790's usually cost less than 50 cents. *Taxation in the United States*, R.E. Paul, Little, Brown & Co., Boston, 1954, at 6.

[12] "Oxy-Fuel News Letter," Vol. 5, No. 31. (November 22, 1993, Hart Publications, Arlington, Va.)

[13] The federal excise tax is 1.2 cents per cigarette. 26 U.S.C.S. § 5701 Montana's excise tax is .9 cents per cigarette. Mont. Code Ann. § 16-11-111. According to the United States Department of Agriculture, there is about 1.7 pounds of tobacco in 1,000 cigarettes and the average price of cured tobacco is about $1.90 per pound. "Tobacco Situation & Outlook," Economic Research Service, USDA, TS-216 (Sept. 1991). Thus, the value of the tobacco in a cigarette is about 1/3 of a cent. The current federal excise tax is four times the value of the tobacco in a cigarette. The current Montana excise tax is three times the value of the tobacco.

H. The Circuit Court's and the Taxpayers' Demand That the Department Give a Particularized Accounting of Actual Damages and Costs Caused by These Taxpayers Illustrates Why *Halper* cannot be Applied to the Montana Tax.

The circuit court's requirement for a showing of the "actual costs" and the Taxpayers' demand for an accounting as applied to these individual Taxpayers illustrates the inapplicability of *Halper* to the Montana Tax. The penalty at issue in *Halper* involved fraud on the federal government and was statutorily linked to the damages. In such cases there is an "actual cost," a monetary loss, to the federal government caused by the illegal act in addition to the costs of investigation, trial, etc.

It is difficult to do an accounting of the "actual costs" of drug abuse and trafficking on society apart from those general studies which are in the public record and of which the Court has taken judicial notice. See *Treasury Employees v. Von Raab*, 489 U.S. 656, 688 (1989). The costs of drugs on society are diffused throughout society and defy "particularized" accounting.[14] The cost of illegal drugs on government services is equally diffuse.[15]

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[14] The costs of drugs to society is difficult to estimate. For example, one report is *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980*, Research Triangle Institute, June 1984, RTI/2734/00-01FR, Research Triangle Park, North Carolina. In 1980 that report estimated the total direct and indirect cost of drugs on society was almost 47 billion dollars. *Id.* at 4. That report estimated in 1980 the additional costs were public and private criminal justice expenses ($5.9 billion), lost employment of crime victims ($845 million) and the ultimate incarceration of convicted criminals ($1.5 billion). *Id.* at 5.

[15] In 1989 the federal government's best guess was that it spent $6.3 billion dollars on services related to illegal drugs with about $200 million being spent by the federal courts alone. "National Drug Control Strategy, Budget Summary." The White House, 1990 pp. 7-8.

The Taxpayers grew and sold large amounts of marijuana. After their initial sale of the marijuana it is impossible to trace their marijuana to the street where it was finally consumed. The Taxpayers were far removed from the actual consumers whose consumption of marijuana and associated activities result in the societal and governmental costs. Yet, the Taxpayers were the essential initiating cause of all these costs.

Where the sanctioned activity is so removed from the ultimate damages and cost of that activity, the Court's analysis under *Halper* fails. In such instances the more generalized test for sanctions developed by the Court in *United States v. Ward*, 448 U.S. 242 (1980), must be applied. As shown in the Department's first brief at pages 31 through 32 under the standards developed by the Court in *Ward* the Montana Tax is clearly remedial.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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December 1993

No. 93-144

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF MONTANA, PETITIONER

v.

KURTH RANCH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether requiring respondents, who had been convicted of possession of marijuana and/or conspiracy to possess marijuana in a separate proceeding, to pay Montana's Dangerous Drug Tax on the marijuana they possessed would violate the Double Jeopardy Clause.

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Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-144

DEPARTMENT OF REVENUE OF MONTANA, PETITIONER

v.

KURTH RANCH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN OPPOSITION

INTEREST OF THE UNITED STATES

This case raises the question of whether and in what circumstances the imposition of a tax may be barred because the taxpayer has previously been convicted of a criminal offense. The United States is responsible both for prosecuting federal criminal offenses and for collecting federal taxes. The United States therefore has a substantial interest in the question of whether and under what circumstances a criminal prosecution may foreclose the ability of a jurisdiction to collect taxes.

STATEMENT

1. The Kurth family operated a mixed grain and livestock farm in Choteau County, Montana. The family consisted of Richard M. Kurth, his wife, Judith M. Kurth, their son and his wife, Douglas M. Kurth and Rhonda I. Kurth, and their daughter and her husband, Cindy K. Halley and Clayton H. Halley (the Kurth respondents). In late 1985 and early 1986 they began to grow and sell marijuana to supplement their income. On October 18, 1987, state and federal law enforcement personnel raided the farm and seized over 2,000 marijuana plants in various stages of growth; eight pounds of marijuana buds, apparently ready for sale; approximately 100 pounds of marijuana "shake," consisting of the parts of a marijuana plant other than its buds; and a number of other items. Pet. App. 28-30.

The Kurth respondents were charged in state court with criminal offenses relating to the possession and sale of dangerous drugs. On July 18, 1988, Richard M. Kurth pleaded guilty to sale of marijuana, in violation of Mont. Code Ann. § 45-9-101[1]; possession of marijuana, in violation of Mont. Code Ann. § 45-9-103; solicitation of the commission of criminal possession of marijuana, in violation of Mont. Code Ann. § 45-4-101; and criminal possession of hashish, in violation of Mont. Code Ann. § 45-9-102. The other Kurth respondents—Judith M. Kurth, Douglas Kurth, Rhonda Kurth, Clayton Halley, and Cindy Halley—pleaded guilty only to conspiracy to possess marijuana with intent to sell it, in violation of Mont. Code Ann. § 45-4-

[1] All citations to the Montana Code Annotated are to the 1993 edition.

102. Richard Kurth was sentenced to 20 years' imprisonment, with the last 15 years suspended. Judith Kurth was sentenced to five years' imprisonment, with the last four years suspended. Douglas Kurth received a suspended sentence of 20 years' imprisonment. Clayton Halley received a suspended sentence of ten years' imprisonment. The imposition of sentence on Rhonda Kurth and Cindy Halley was deferred for three years. Pet. App. 30-32.

2. Montana's Dangerous Drug Tax Act, Mont. Code Ann. §§ 15-25-101 *et seq.*, provides that "each person possessing or storing dangerous drugs is liable" for a tax based on the value of the drugs. Mont. Code Ann. § 15-25-111. In the case of marijuana, the tax is computed at 10% of the assessed market value of the drugs or $100 per ounce, whichever is greater. Mont. Code Ann. § 15-25-111(2)(a) and (b). The Act took effect 17 days before the raid on the Kurths' farm.

On December 8, 1987, the State assessed a tax on the Kurth respondents pursuant to the Dangerous Drug Tax Act. The tax was initially assessed at $491,776.20, including a 10% penalty and 1% interest, but revised assessments in greater amounts were subsequently issued. Pet. App. 33-34.

3. On September 8, 1988, the Kurth respondents, along with the Kurth Ranch and the Kurth Halley Cattle Company, two entities that they controlled, filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code. The State filed a proof of claim of its tax assessment with the bankruptcy court, which was challenged by the debtors and the trustee in bankruptcy. Pet. App. 5. The bankruptcy court disallowed much of the State's claim, on the

ground that the assessment of the amount of the tax was arbitrary. *Id.* at 39-49. But the court held that the tax was properly computed as to the marijuana buds that were packaged for sale and as to the marijuana "shake." The court found that the value of the buds was $2,000 per pound, and that the value of the "shake" was $200 wholesale and $250 to $500 retail per pound. Accordingly, the tax was computed on both items at the minimum $100 per ounce ($1,600 per pound) rate. *Id.* at 49-51. The tax on the two items totaled $208,150, without interest. *Id.* at 58.

The bankruptcy court held, however, that, because the Kurth respondents had previously been convicted in criminal proceedings, imposition of the tax in a subsequent proceeding would violate the Double Jeopardy Clause. In the bankruptcy court's view, that result was required by this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989), which held that imposition of a civil penalty on a litigant after a criminal prosecution could violate the Double Jeopardy Clause. Pet. App. 53-59. The district court affirmed the bankruptcy court's ruling. *Id.* at 13-22.

4. The court of appeals affirmed. Pet. App. 1-12. According to the court, *Halper* established that "the double jeopardy analysis requires the trial court to determine whether there is a rational relationship between the sanction imposed and the damages suffered by the government." *Id.* at 8. The court reasoned that "[i]f the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by [the State], the Kurths are entitled to an accounting in order to determine if the sanction constitutes an impermissible additional punishment." *Id.* at 10. In this case, however, the State had "refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects." *Id.* at 10. The court held "that allowing the state to impose this tax, without any showing of some rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits." *Id.* at 11. In the court's view, "[b]y refusing to offer any evidence justifying its imposition of the tax, the State * * * failed to meet the threshold requirements under *Halper*." *Ibid.*

SUMMARY OF ARGUMENT

In *United States* v. *Halper*, 490 U.S. 435, 449 (1989), this Court held that imposition of a civil penalty may be regarded as a second "punishment" for purposes of the Double Jeopardy Clause "to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." In *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court applied a similar analysis to hold that a civil forfeiture may be regarded as a punishment for purposes of the Eighth Amendment's Excessive Fines Clause. In both cases, the question whether the measure should be regarded as imposing a punishment turned on whether it could be explained by reference to compensatory purposes. That inquiry was necessary because civil penalties and civil forfeitures are based on dual penal/non-penal purposes, and in both cases the non-penal purpose is a remedial or compensatory one. Accordingly, if a civil penalty or forfeiture cannot be explained on the basis of its remedial or compensatory purpose, it is reasonable to conclude that it must be based on a penal purpose—*i.e.*, it must be regarded as imposing a punishment.

Deciding whether a tax is a punishment, however, requires recognition that taxes—unlike civil penalties or forfeitures—are not ordinarily based on compensatory or remedial purposes. Rather, taxes typically serve to raise revenue for the government, and they ordinarily are not tied to any particular benefit received by the taxpayer nor to any specific cost that the taxpayer's activities impose on the government. The court of appeals therefore erred in concluding that the absence of a proven remedial purpose in the case of the Montana Dangerous Drug Tax required a holding that the tax should be regarded as a punishment. Under the appropriate analysis, a tax would not be regarded as imposing a punishment if it could be explained on the basis of a revenue-raising (taxing) purpose.

The fact that taxes may have dual purposes—both raising revenue and regulating conduct—does not alter that conclusion. Even if the regulatory purposes often served by taxes were treated like the deterrent or retributive purposes that are characteristic of penal measures—and we doubt that the essentially criminal concept of deterrence can be stretched that far—the fact remains that the *Halper*/*Austin* analysis does not depend on whether a given measure may serve both penal and non-penal purposes. If a measure has dual penal and non-penal purposes, *Halper* and *Austin* establish that it will ordinarily not be regarded as imposing a punishment. Only if the measure extends *beyond* its non-penal purpose is it presumed that it is based at least in part on a penal purpose and must thus be regarded as imposing a punishment. Thus, if a tax measure can be explained on the basis of its non-penal purpose of

raising revenue, it should be regarded as a genuine tax for double jeopardy purposes, and not as a penal measure.

That is not to say that any measure that carries the label of "tax" could not possibly be regarded as imposing a punishment under the Double Jeopardy Clause. Two key principles are useful in determining whether a tax is based on a revenue-raising purpose. Application of these principles will resolve the issue in this and most other cases.

First, where the tax is a tax of general applicability that is imposed on both legal and illegal goods or activities, there is ordinarily no reason for any further inquiry into whether it is a punishment. The fact that the burden of the tax falls on both legal and illegal goods or activities generally ensures that the tax serves the normal revenue-raising purposes of taxation, and that the tax is therefore not a penal measure in disguise. It would be anomalous to permit a defendant to claim a previous criminal prosecution as an exemption from liability for income or other generally applicable taxes.

Second, where the incidence of the challenged tax is solely on illegal goods or activities—as is true in this case—the analysis should turn on whether the tax is of a type, and in an amount, that is ordinarily also imposed on legal goods and activities. For if similar taxes are imposed on legal goods and activities, there is no basis for concluding that the legislature has departed from the ordinary revenue-raising purposes that underlie tax statutes in taxing the illegal goods or activities. In this case, because "sin" taxes are commonly imposed on goods like those at issue in this case, and because the tax at issue here is a value-

based tax that is in an amount that is well within the ordinary range of such taxes, there is no basis for concluding that the tax is a punishment in disguise.

ARGUMENT

MONTANA'S DANGEROUS DRUG TAX DOES NOT IMPOSE A "PUNISHMENT" ON THE TAXPAYER, AND THE DOUBLE JEOPARDY CLAUSE THEREFORE DOES NOT BAR IMPOSITION OF THE TAX IN THIS CASE

A. THE COURT OF APPEALS ERRED IN ASSESSING THE VALIDITY OF MONTANA'S DANGEROUS DRUG TAX IN TERMS OF WHETHER IT SERVED A COMPENSATORY PURPOSE

In two recent cases, this Court has held that civil proceedings can be characterized as imposing "punishment" if they cannot be explained as serving a compensatory, remedial purpose. The court of appeals in this case erred in transposing the analysis employed in those two cases to the very different context here. Since taxes do not ordinarily serve a compensatory purpose, the fact that Montana's Dangerous Drug Tax may not serve such a purpose does not establish that it must be viewed as imposing a punishment under the Double Jeopardy Clause. Indeed, if the court of appeals' conclusion were correct, a taxpayer who had been convicted of income tax evasion could claim immunity from a later civil proceeding to collect the taxes owed; the defendant could reasonably claim that the income tax serves no compensatory purpose and could characterize the tax, like the criminal prosecution, as a penalty for receiving income without paying the tax.

1. In *United States* v. *Halper*, 490 U.S. 435, 436 (1989), this Court considered "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." The defendant in *Halper* had submitted 65 false Medicaid claims to the government that resulted in an overpayment to him of $585. He was first convicted of violating the criminal false claims statute, 18 U.S.C. 287, and was then sued for civil penalties under the False Claims Act, 31 U.S.C. 3729-3731. The district court held that imposing the statutory penalty of $2,000 per violation—or a total of more than $130,000—would violate the Double Jeopardy Clause.

This Court agreed with the district court in *Halper* that a civil penalty under the False Claims Act could constitute a forbidden multiple punishment where the defendant had previously been prosecuted criminally for the same offense. The Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-449.

The analysis in *Halper* turned on the extent to which the civil penalty could be explained as compensating the government for a loss. The Court held that, to be classified as punishment, a civil penalty must "be so extreme and so divorced from the Government's damages and expenses as to constitute punishment," 490 U.S. at 442; it must "bear[] no rational relation to the goal of compensating the

Government for its loss," *id.* at 449.[2] Although "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice," *ibid.*, "even an approximation will go far towards ensuring both that the Government is fully compensated for the costs of corruption and that, as required by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment." *Id.* at 450.

2. The Court adopted a similar approach in analyzing the dual penal/non-penal purposes underlying a civil forfeiture in its recent decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993). The question presented in *Austin* was whether a civil forfeiture imposes a "punishment" that is subject to the Eighth Amendment's proscription of excessive fines. Relying on *Halper*, see 113 S. Ct. at 2806, 2812, the Court explained that forfeitures, like the civil penalty in *Halper*, could serve both remedial and penal purposes. Thus, resolution of the case depended on whether the civil forfeiture "can only be explained as serving in part to punish." 113 S. Ct. at 2806. The Court analyzed "the historical understanding of forfeiture as punishment," as well as the intended penal purposes of the specific forfeiture statute at issue. *Id.* at 2812. As in *Halper*, the Court concluded that, since the civil forfeiture could not be explained as serving a remedial purpose, the only conclusion left was that it

[2] See also 490 U.S. at 446 (whether the "supposedly remedial sanction * * * remotely approximate[s] the Government's damages and actual costs"); *id.* at 451 (civil penalty must be "rationally related to the goal of making the Government whole").

must serve deterrent and/or retributive purposes—*i.e.*, it must be viewed as "punishment" under the Excessive Fines Clause.

3. The court of appeals in this case purported to employ the *Halper/Austin* inquiry into whether the measure being challenged can be explained as serving only compensatory or remedial purposes. Thus, the court of appeals noted that Montana had "refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects." Pet. App. 10.[3] For the court of appeals, that was dispositive: The court's conclusion that the tax imposed a punishment was based entirely on its holding "that allowing the state to impose this tax, without any showing of rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits." *Id.* at 11. In short, the court believed that, because the Montana Dangerous Drug Tax had not been shown to serve a compensatory purpose, it must constitute punishment for double jeopardy purposes.[4]

[3] The State had asked the court to take judicial notice of the substantial costs imposed by drug use, but the court of appeals refused. Pet. App. 10. In our view, that refusal may well have been wrong; the costs of drug use are well known. See *e.g.*, *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2705-2706 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *United States* v. *A Parcel of Land with a Building Located Thereon*, 884 F.2d 41, 44 (1st Cir. 1989). Accordingly, those costs may well have been a proper subject for judicial notice. Since, as we argue below, there generally is no reason to inquire whether a tax serves a compensatory purpose, the court's ruling on this point is not in our view significant.

[4] It should be noted that, aside from Richard Kurth, each of the other Kurth respondents were prosecuted criminally in

4. The court of appeals erred in relying on the absence of a proven compensatory purpose to find that the Montana tax must be regarded as imposing a punishment. Although civil penalties and forfeitures commonly serve a compensatory or remedial purpose at least in part, taxes do not. Taxation is "a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens." *Welch* v. *Henry*, 305 U.S. 134, 146 (1938); accord, *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 606 (1975). Aside from the

state court for conspiracy to possess marijuana; only Richard Kurth was prosecuted for the substantive offense of possession of marijuana. This Court has recently reaffirmed the principle that conspiracy to commit a substantive offense is not "the same offense" for double jeopardy purposes as the substantive offense itself. *See United States* v. *Felix*, 112 S. Ct. 1377, 1384-1385 (1992). That is because, under the "elements" test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), each offense requires proof of an element not required by the other: the conspiracy charge requires proof of an agreement, while the substantive charge requires proof of the completed offense. This Court has only recently reaffirmed the applicability of the *Blockburger* test. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2859-2864 (1993). We know of no reason to relax the "elements" test where the second proceeding is civil, rather than criminal, and where only the protection against multiple punishment, and not the protection against a successive criminal prosecution, is involved. Compare *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983).

We recognize that this argument was not presented to the court of appeals. But the fact that the tax imposed on five of the six taxpayers in this case was based on possession of marijuana, an offense that is not the same as that for which they were previously prosecuted, appears from the facts recited by the courts below, see Pet. App. 30-32, and cannot seriously be disputed.

narrow category of users' fees, see, *e.g.*, *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), "[t]axes are what we pay for civilized society." *Compania General de Tabacos de Filipinas* v. *C.I.R.*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). They are generally not intended to compensate the government for any particular benefits a taxpayer enjoys or any particular burdens the taxpayer imposes upon the government or the general public. *Illinois Cent. R. Co.* v. *Decatur*, 147 U.S. 190, 198 (1893). As this Court has explained, "[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 (1981) (quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521 (1937)).[5]

The hallmark of a tax is thus the raising of revenue, irrespective of the benefits enjoyed by a particular taxpayer or the costs that taxpayer may impose on the government. The fact that Montana's Dangerous Drug Tax cannot be explained as serving a compensatory or remedial purpose therefore provides no support for the court of appeals' conclusion that it must be regarded as imposing a punishment.

[5] Compare *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 190 (1989) ("there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations").

B. IF A TAX CAN RATIONALLY BE EXPLAINED AS SERVING A REVENUE-RAISING PURPOSE, IT SHOULD NOT BE REGARDED AS IMPOSING "PUNISHMENT"

1. Although the inquiry into compensatory purposes served by a particular measure has no application in tax cases, *Halper* and *Austin* nonetheless provide guidance in addressing the question presented in this case. The principle guiding the decisions in *Halper* and *Austin* was that, if the measure being challenged as imposing a punishment may serve both penal and non-penal purposes, but the non-penal purposes are insufficient to explain its enactment or application, then the measure must be regarded as punishment.[6] In other words, when analyzing a civil measure that has dual penal and non-penal purposes, the analysis turns on whether the non-penal (in *Halper* and *Austin*, compensatory) purposes are insufficient to explain the measure, either in general or

[6] In *Halper*, for example, the Court made clear that a civil penalty would *not* be considered punishment insofar as it bore a rational relationship to a compensatory (*i.e.*, non-penal) purpose, regardless of whether it may also serve other, penal purposes. See, *e.g.*, 490 U.S. at 449 (question was whether "the civil penalty * * * bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word"); *ibid.* (referring to the difficulty of determining "the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment"); *id.* at 450 (referring to "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment").

in a particular case. If the non-penal purposes are sufficient, the fact that the measure may serve penal purposes as well is essentially irrelevant.

It is important to recognize that the *Halper/Austin* analysis does not characterize a civil measure as imposing punishment simply because the measure has dual penal and non-penal purposes. Indeed, if the existence of dual purposes were sufficient to require regarding a civil sanction as punishment, no extensive analysis and remand would have been necessary in *Halper*, for it is likely that every civil *penalty* would have to be regarded as punishment. As the Court in *Halper* acknowledged, however, the mere fact that from the defendant's point of view "even remedial sanctions carry the sting of punishment" is insufficient to characterize remedial sanctions that are imposed in a civil proceeding as punishment. 490 U.S. at 447 n.7. Once the determination has been made that a civil measure can be explained in terms of a non-penal purpose, that is the end of the inquiry.

2. When applied in the context of a tax statute, the inquiry into whether the tax must be regarded as imposing a punishment thus turns on whether the tax can be explained as serving the non-penal purpose of raising revenue. If it can, the tax is properly viewed as a genuine tax, not a punishment in disguise. Only if the tax cannot rationally be explained as serving a revenue-raising function—*i.e.*, only if it is not, despite its label, a tax at all—may it be regarded as imposing a punishment for double jeopardy purposes.

The fact that taxes frequently serve a dual function thus does not alter the conclusion that the existence of a revenue-raising purpose—regardless of what

other purposes might be served—is sufficient to establish that a tax should not be regarded as a "punishment." In addition to raising revenue, "[e]very tax is in some measure regulatory," since "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937). But this Court has made clear that "a tax is not any the less a tax because it has a regulatory effect." *Ibid*; accord *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950); *United States* v. *Doremus*, 249 U.S. 86, 93-94 (1919). Indeed, in *Bob Jones University* v. *Simon*, 416 U.S. 725, 741 n.12, 743 (1974), the Court noted that it had abandoned the effort to distinguish between revenue-raising and regulatory taxes on the basis of the primary purpose of the enactment.

For example, in *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934), the taxpayer complained that a high tax imposed by a State on butter substitutes—but not on butter—was unconstitutional under the Due Process Clause. In discussing the challenge, the Court held that the tax would be found unconstitutional only if the taxing statute is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Id.* at 44. A tax is subject to challenge as confiscatory only if "its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise." *Id.* at 44-45. See also *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 375 (1974) (rejecting claim that tax is a taking and holding that "even if the revenue collected had been

insubstantial, * * * or the revenue purpose only secondary, * * * [the Court] would not necessarily treat this exaction as anything but a tax entitled to the presumption of the validity accorded other taxes imposed by a State"), citing *Sonzinsky* v. *United States*, 300 U.S. 506, 513-514 (1937), and *Hampton & Co.* v. *United States*, 276 U.S. 394, 411-413 (1928).

The regulatory purposes frequently served by taxes are not properly equated with the deterrent purposes that this Court has identified, along with retribution, as underlying penal measures. While legislatures often seek to mold social behavior by imposing varying levels of taxation on distinct activities, the legislature's purpose is not ordinarily to eliminate entirely the disfavored activity (as is the case with criminal prohibitions). Nor is it to cast the kind of social opprobrium on those who engage in the disfavored activity that would follow from the violation of a criminal statute. But even if the regulatory purposes served by some tax measures were equated with the deterrent purposes that this Court held in *Halper* to be a characteristic of "punishment," a tax that serves both revenue-raising and regulatory purposes is valid under that case.

3. It may be objected that the standard we advance to determine whether a tax statute imposes a punishment—*i.e.*, whether the statute can be explained as based on a revenue-raising purpose—would result in toothless judicial review of tax measures that are claimed to impose criminal punishments. But substantial deference to legislative judgments as to the subjects and rates of taxation is an entirely appropriate result of the standard we propose.

Initially, it should not be unexpected that the standard we propose would result in less close judicial scrutiny of tax measures than of the civil penalties or forfeitures that were at issue in *Halper* and *Austin*. *Halper* involved a provision imposing a monetary exaction that was expressly labeled a "civil penalty." Virtually by definition, there was thus a substantial basis in *Halper* for suspecting that the "penalty" at issue imposed a punishment. Yet even in that context, the Court did not find the label dispositive. Instead, it adopted a test that permits dual purpose penal/non-penal civil penalties to be imposed after a criminal prosecution, so long as the non-penal purpose is sufficient to explain the entire amount of the sanction.

In *Austin*, the forfeiture measure under scrutiny was not stamped by the legislature with the express label of "penalty." But the measure did come before the Court with what the Court determined to be a consistent historical record recognizing that civil forfeitures are intended to serve penal purposes. 113 S. Ct. at 2806-2810. And the Court found additional evidence for that proposition in the provisions and legislative history of the particular forfeiture statute that was invoked in *Austin*. See *id.* at 2810-2812.[7] Indeed, the evidence in *Austin* that punishment was intended was sufficiently strong that the Court found

[7] The concurring Justices did not appear to disagree. See 113 S. Ct. at 2813-2814 & n.* (Scalia, J., concurring in part and concurring in the judgment) (agreeing that forfeitures were historically regarded as punitive); *id.* at 2814 (agreeing that the statute suggests penal purposes as well). See also *id.* at 2815 (Kennedy, J., concurring in part and concurring in the judgment).

it possible to decide the case without considering the particular facts of the forfeiture before it, as it had in *Halper*. Cf. 113 S. Ct. at 2812 n.14.

Tax statutes—unlike civil penalty provisions—do not come before a court accompanied by an express label indicating that a penalty was intended. Nor is there ordinarily a historical or statutory background to a tax statute—as in the case of the *Austin* forfeiture provision—that demonstrates that a penal result was intended. To the contrary, this Court has consistently regarded measures that have a revenue-raising purpose as legitimate taxes and has repudiated the contention that the fact that the measures may have a regulatory purpose as well requires them to be regarded as penal. See pp. 16-17, *supra*. Moreover, this Court has repeatedly instructed that "[t]he simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial resolution." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 627 (1981) (citing cases).[8] It is thus entirely consistent with the historical understanding of taxes and with the legislature's very substantial discretion in imposing taxes to hold that, if the tax is supported by a revenue-raising purpose, it does not constitute a punishment for purposes of the Double Jeopardy Clause.

[8] Accord *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2332 (1992); *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 344 (1989); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547 (1983); *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940) ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification.").

C. MONTANA'S DANGEROUS DRUG TAX DOES NOT IMPOSE A PUNISHMENT AND MAY THEREFORE BE VALIDLY APPLIED IN THIS CASE

We acknowledge that it is conceivable that a legislature could attempt to impose a criminal-type penalty under the label of a "tax." A number of factors may be relevant in determining whether a tax challenged as imposing punishment for double jeopardy purposes is in fact a revenue-raising measure or whether instead "the form of taxation was adopted as a mere disguise." *A. Magnano*, 292 U.S. at 44-45. Although we do not purport to offer an exhaustive catalogue of factors, a few principles that can guide the analysis may be sufficient to resolve most cases that arise in this area.

1. Where the challenged tax is one of general applicability, *i.e.*, where it is imposed on both legal and illegal goods or activities, there is no reason for any further inquiry into whether it in fact imposes a punishment.[9] Any other rule would lead to the absurd conclusion that an individual who commits a criminal offense and is successfully prosecuted for it obtains an immunity from taxes that his counterpart who engages in a similar, legal business must pay. See

[9] In order to qualify as a tax of general applicability, the tax need not apply by its own terms in precisely the same manner to a variety of goods or activities. For example, a State may impose slightly different rates of sales and use taxes on different goods that, taken together, form one coherent sales tax scheme. If it fits within such an overall scheme, even a specific sales tax that is levied solely on sale of illegal drugs would be a tax of general applicability, since it would form one component of the State's sales tax scheme.

United States v. *Constantine*, 296 U.S. 287, 293 (1935) ("It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law."). There is no basis for providing that kind of perverse financial incentive to those who violate the criminal law, and this Court has consistently rejected the proposition that a criminal prosecution provides a tax immunity to a criminal defendant. See, *e.g.*, *James* v. *United States*, 366 U.S. 213, 221 (1961) (plurality opinion); *Spies* v. *United States*, 317 U.S. 492, 495 (1943).[10]

The above principle is applicable even where the failure to pay the tax renders the otherwise legal activity illegal. Perhaps the clearest example would be the federal income tax. Under federal law, a tax is imposed on income, "from whatever source derived," 26 U.S.C. 1, 61(a), and willful failure to pay the tax is a serious criminal offense, 26 U.S.C. 7201. It obviously would not avail an individual who has been convicted of tax evasion to set up his criminal conviction as a bar to collection of the tax he owes. To be sure, the criminal defendant/taxpayer could argue that the income tax was being imposed on the same, illegal activity for which he was criminally prosecuted—*i.e.*, receiving income without paying the tax on it. But

[10] See also *Iannielli* v. *Commissioner*, 98 T.C. 165, 179 (1992) ("A taxpayer sentenced to imprisonment and fined after conviction in a criminal tax matter is punished for the commission of a crime, and is not thereby relieved of his obligation to pay taxes due"); *Lockman* v. *Commissioner*, 58 T.C.M. (CCH) 542, 544 (1989) ("It is well settled that [the Commissioner] is not barred from collecting deficiencies and associated civil sanctions from the taxpayers who have pled guilty to a criminal charge). Cf. *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938).

that argument could not prevail; a criminal conviction does not provide a general immunity from civil obligations.[11]

2. The tax in this case is not one of general applicability in the above sense. The analysis therefore should ask whether the tax is of a type, and in an amount, that is in accord with taxes ordinarily imposed on legal goods and activities. For if similar taxes are imposed on legal goods and activities, there is no basis for concluding that the legislature has departed from the ordinary revenue-raising purposes that underlie tax statutes in taxing the illegal goods or activities. The fact that the goods or activities subject to the tax are illegal—and that the individual on whom the tax is imposed has previously been convicted of a crime—surely should not give that individual immunity from an otherwise lawful tax. Cf. *Marchetti* v. *United States*, 390 U.S. 39, 44 (1968) ("The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation.").

Because the tax at issue here is a value- and quantity-based tax that is in an amount that is well within the general range of such taxes, there is no basis for concluding that the tax is in fact a punishment in disguise. "Sin" taxes are commonly imposed on goods like those at issue in this case. Like many

[11] Another example is provided by the National Firearms Act, 26 U.S.C. 5801 *et seq.* That statute, *inter alia*, imposes a tax and registration requirement on the transfer of certain defined firearms. 26 U.S.C. 5812. The statute also makes it a criminal offense to possess an untaxed and unregistered firearm. 26 U.S.C. 5861(d), 5871. As in the case of income taxes, an individual who is convicted and punished for possession of an unregistered firearm may not set up his conviction as a defense to payment of the tax.

sin taxes, the tax in this case is based on the value of the item taxed. For example, the federal tax on most cigars is set at approximately the same rate as the 10% tax on marijuana imposed by the Montana Dangerous Drug Tax. See 26 U.S.C. 5701(a)(2) (Supp. IV 1992) (tax rate of 10.625% to 12.75% of the sales price, subject to maximum dollar limit). Although Montana supplements the percentage tax with a minimum tax on marijuana of $100 per ounce that is based on quantity, not value, that method is also commonly used in sin taxes. See 26 U.S.C. 5701(b) (Supp. IV 1992) (tax on cigarettes calculated per cigarette); 26 U.S.C. 5001 (Supp. IV 1992) (tax on distilled spirits calculated on the basis of alcoholic strength and quantity).

Nor could it be argued that the amount of the tax in this case is so high as to be punitive. With respect to the marijuana "buds" prepared for sale by the Kurths, the bankruptcy court found that their market value was approximately $2,000 per pound, and that, because of the $100 per ounce minimum, the tax was imposed at $1,600 per pound, or 80% of market value. Pet. App. 50-51. That amount bears a rational relationship to the value of the item being taxed, compare *Halper*, 490 U.S. at 449, 451, is not set at a dramatically higher level than similar taxes imposed on comparable products, and may well be accounted for by special features attendant on the illegal nature of the marijuana business. Cf. *United States* v. *Constantine*, 296 U.S. at 297-298 (Cardozo, J., dissenting). For example, although the federal tax on cigarettes is currently only 24 cents per pack, 26 U.S.C. 5701(b) (Supp. IV 1992), President Clinton's recently proposed health care plan would increase that amount to

99 cents per pack. See 139 Cong. Rec. E2687 (daily ed. Oct. 28, 1993). If that tax were enacted, the total tax burden on cigarettes in some jurisdictions, including federal, state, and local taxes, could easily surpass the 80% rate that Montana effectively applied in this case.

The same conclusion follows with respect to the marijuana "shake," which the bankruptcy court found to have a value of $200 to $500 per pound, and which, by virtue of the $100 per ounce minimum, was subjected to a $1600 per pound tax. Pet. App. 50-51. Although the effective rate on "shake" is higher than that on "buds", that appears to be the result of the application of Montana's minimum tax rate on a very low-quality, inexpensive product. Any tax that is imposed at a fixed rate can have such an impact on a very inexpensive, low-quality product. See, *e.g.*, 26 U.S.C. 4064 (Supp. IV 1992) (tax of $7,700 per automobile on automobiles with fuel economy of less than 12.5 miles per gallon); 26 U.S.C. 4131(c)(2), as reinstated by the Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, § 13421(c)(1), 107 Stat. 566 (fixed tax on vaccines, ranging from 6 cents to $4.56 per dose); 26 U.S.C. 4681 (Supp. IV 1992) (fixed tax on ozone-depleting chemicals). So long as the tax bears a rational relationship to the ordinary value of the product, the fact that a fixed tax rate has a disproportionate impact on a low-quality product does not convert it into a punishment for those on whom the disproportionate impact falls.

Finally, the statutory language and legislative history support the conclusion that Montana's Dangerous Drug Tax is a revenue-raising measure. Cf. *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). The statute is codified as part of Montana's tax code, the tax is collected by the Montana Department of

Revenue, and much of the machinery by which Montana ordinarily collects taxes is applicable to the Dangerous Drug Tax. See Mont. Code Ann. § 15-25-113. The preamble to the statute recites that there exists in Montana "a large and profitable dangerous drug industry" and an "expensive trade in dangerous drugs," that the drug industry has an "economic impact upon the state," and that "it is appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses." See *Sorenson* v. *State Dep't of Revenue*, 836 P.2d 29, 31 (Mont. 1992). Funds collected from the tax are earmarked for youth evaluations, chemical abuse assessment and aftercare, and juvenile detention facilities. Mont. Code Ann. § 15-25-122. All of those indications support the conclusion that, whatever other purposes it may serve, the Dangerous Drug Tax can be explained as a revenue-raising measure. Accordingly, it is not a "punishment" that is subject to the proscriptions of the Double Jeopardy Clause.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1993

NO. 93-144
IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1993

DEPARTMENT OF REVENUE OF THE
STATE OF MONTANA,
Petitioner

V.

KURTH RANCH;
KURTH HALLEY CATTLE COMPANY;
RICHARD M. and JUDITH KURTH,
husband and wife;
CLAYTON H. and CINDY K. HALLEY,
husband and wife;
ROBERT G. DRUMMOND,
Trustee,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF BY THE STATES OF ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MINNESOTA, NEBRASKA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH AND WISCONSIN IN SUPPORT OF PETITIONER

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TABLE OF AUTHORITIES

The States of Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, Utah and Wisconsin, through their respective Attorneys General, respectfully submit this brief *amicus curiae* pursuant to S.Ct. R. 37 in support of the petitioner.

INTEREST OF THE *AMICI* STATES

Each state appearing as an *amicus curiae* in this case has enacted taxing statutes for the purpose of generating revenue to support the cost of government. Many of the *amici* states levy an excise tax like Montana's on dangerous drugs to apportion the cost of government and, incidentally, to require that those who contribute to the government's costs also contribute to its revenues.[1]

---

[1]At least 27 states have similar excise taxes. See Appendix to *Amicus Curiae* Brief in Support of the Petition by the states of Kansas, et al.

Extending the double jeopardy concepts of *United States v. Halper* to taxes, as the Court of Appeals has done in this case, will impede the states' abilities to impose and administer taxes which are fairly and rationally related to obtaining revenue from genuine economic value. *United States v. Halper*, 490 U.S. 435 (1989). Assuming, arguendo, that the tax is a sanction, any initial requirement that the states prove that a sanction is non-punitive will make all civil sanctions more difficult and costly to enforce.

SUMMARY OF THE ARGUMENT

The Court of Appeals was wrong to apply *Halper* in this case because Montana's tax on dangerous drugs is a true excise tax and not a penalty. A tax does not cease to be a tax merely because it has a regulatory effect, even if it is directed at illegal activities and produces only a small amount of revenue.

Legislative bodies have broad authority to define and classify subjects of taxation. The Montana statute rationally classifies items of

genuine economic value and imposes a tax on a unit of weight basis. Taxes and tax rates may be set independently of any benefit to the taxpayer and independently of any harm done by the taxpayer. Taxes are not designed to be compensatory or remedial.

Even if Montana's tax were analyzed as a penalty under *Halper*, it would not violate double jeopardy because it is not disproportionate. *Halper* holds that double jeopardy is violated where a fixed penalty appears to be overwhelmingly disproportionate or not rationally related to the damages caused by a wrongdoer. The Montana statute imposes tax in a direct ratio to the nature and volume of taxable items possessed by the taxpayer. Because the tax is always proportionate, it is permissible under *Halper* and enforceable in this case.

ARGUMENT

I. Montana's excise tax is a legitimate exercise of its taxing power and is not subject to the *Halper* test.

A. Montana's statute is a true tax in form and function.

The Court of Appeals in this case held that Montana's tax on dangerous drugs, as applied to the Kurths, violated the double jeopardy clause because Montana offered no evidence of its costs and expenses related to the Kurths' activities. *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993). "By refusing to offer any evidence justifying its imposition of the tax, the State has failed to meet the threshold requirements under *Halper*." *Id.* at 1312. "The tax assessment ... [therefore] constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause." *Id.*

The Court of Appeals is doubly wrong because *Halper* does not apply to taxes at all and because the Court misapplied the double jeopardy principles of *Halper* to the law and facts of the case. *Halper* applies where a statute provides for: (1) a penalty (2) which is overwhelmingly disproportionate to the

government's damages and costs. Neither of these elements is present in this case.

The Court of Appeals incorrectly assumes, without discussion or analysis, that the excise tax in this case is a civil sanction or penalty subject to *Halper* rather than a tax. Presumably, the Court of Appeals viewed the tax as a penalty simply because possession of the taxable substance is illegal. If so, the Court of Appeals would be wrong.

1. The language and structure of the Montana statute show that it is a tax.

Whether a statute is truly a tax is a question of statutory construction. "We must construe the law and interpret the intent and meaning ... from the language of the tax." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36 (1922) (Child Labor Tax Case).

The Montana statute shows on its face that it operates as a tax. *Sorensen v. Montana*, 836 P.2d 29 (Mont. 1992). Montana taxes the possession and storage of dangerous drugs.

MONT. CODE ANN. §15-25-111 (1992). Montana classifies the various substances into six categories and taxes each proportionally by weight or at 10% of the assessed market value, whichever is greater. *Id.* This is an ordinary excise tax.

2. The fact that a tax is imposed on an illegal activity, and may deter that activity, does not deprive it of its status as a tax.

Taxes are designed to produce revenue for the operations of government. They are predicated on economic value, not on wrongful conduct. It so happens that the economic value in this tax case was produced illegally, but that does not alter the character of Montana's statute as a true tax. *Minor v. United States*, 396 U.S. 87 (1969). A tax is not a penalty. *United States v. Darusmont*, 449 U.S. 292, 298 (1981).

Illegal activities can be taxed. *Marchetti v. United States*, 390 U.S. 39 (1968). "The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and

nothing that follows is intended to limit or diminish the vitality of those cases." *Id.* at 44. "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible." *Id.* at 61. Similarly, the Court has never suggested that states are prohibited from taxing transactions or activities merely because they are illegal.

Regulatory effect does not turn a tax into a penalty. "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible ... or the revenue purpose of the tax may be secondary." *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (citations omitted). Accord, *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 375 (1974).

Previous decisions of this Court considering whether federal statutes exercised the taxing

power or the police power show that Montana's statute is a tax.

"If it was laid to raise revenue its validity is beyond question notwithstanding the fact that the conduct of the business taxed was in violation of law." *United States v. Constantine*, 296 U.S. 287, 293 (1935). *Constantine* held that a flat "special excise tax," which was forty times greater than the basic excise tax and which was conditioned only on the criminality of the business, was an improper penalty because it was an exercise of a police power not given to Congress rather than a tax.

Justices Cardozo, Brandeis and Stone dissented in *Constantine* on the grounds that Congress could reasonably consider the greater profits and the difficulty of tax enforcement arising from the criminal nature of a business in its classification of taxes. *Id.* at 297-298. (Cardozo, J., dissenting). *Constantine*'s holding that the tax in question was a penalty has been undercut by *Sanchez*, but Montana's tax is a valid

tax under either the majority or the minority view.

In the Child Labor Tax Case, the Court concluded that a flat unapportioned "tax" of 10%, which applied only where an employer knowingly departed from a detailed course of conduct and which gave broad enforcement authority to the Secretary of Labor, was really a regulatory measure. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20. "If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this Court to infer solely from its heavy burden that the Act intends a prohibition instead of a tax." *Id.* at 36. Under this test, also, Montana's statute is a tax: it is an excise on a thing of value, devoid of detailed regulatory provisions.

B. States are given great latitude to tax economic value without restrictions as to the rate of the tax or the use of the revenue.

1. A high rate does not convert a tax into a penalty or civil sanction.

The Court of Appeals possibly assumed that the rate of the tax converted it into a penalty. This Court has never restricted state taxation based on the rate of tax.

> In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 628 (1981).

In *Commonwealth Edison*, the Court approved a tax of 30% on coal, rejecting a challenge to the tax under the commerce and due process clauses. "The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." *Id.* at 627. The Court of Appeals, by requiring evidence to justify Montana's tax, would throw the courts into the midst of

political questions with which they are ill-equipped to deal.

Taxes are not meant to provide a *quid pro quo*. "'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.'" *Id.* at 622 (quoting *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. at 521-522).

> 2. Montana's choice to apply these tax revenues specifically to drug-related expenses does not make its tax a penalty or sanction.

Taxes are neither remedial nor punitive. Thus, the basic concept of applying *Halper* to taxes is flawed. *Barnette v. Commissioner*, 95 T.C. 341 (1990). Although Montana has dedicated revenue from its excise tax to problems associated with drug usage, there is no requirement that any tax or its revenues serve any particular purpose.

A legislative body may, of course, consider the sources of its problems in order to fashion its tax provisions. *Alco*, 417 U.S. at 375. In *Alco*, the Court sustained a tax of 20% of gross receipts on commercial parking operations. Both the Supreme Court of Pennsylvania, which struck down the tax in *Alco*, and this Court, in reversing, noted "that the city had decided, 'not without reason, that commercial parking operations should be singled out for special taxation to raise revenue because of traffic related problems engendered by these operations.'" *Id.* (quoting 307 A.2d at 858) (emphasis added by this Court). A different kind of traffic is involved in this case, but it is no less reasonable for Montana to see it as an appropriate source of tax revenue.

The Kurths were assessed $181,000 in taxes on 1811 ounces of harvested marijuana in accordance with the statute.[2] It cannot seriously be disputed that the tax in this case seeks to

[2]Other parts of the original tax assessment were not appealed from the bankruptcy court, and only the tax on harvested marijuana is at issue in this appeal.

reach real economic value. "The extended Kurth family entered the marijuana growing business 'with but one purpose -- that of making large sums of money just as fast as possible in order to pay off a large debt against the family farm.'" *In re Kurth Ranch*, 986 F.2d at 1309. It is reasonable for Montana to enact a tax to direct a portion of those 'large sums of money' to the State Treasury.

II. Even if the Court determines that Montana's tax is a regulatory sanction, the Court of Appeals has misapplied *Halper* in this case.

A. The Court of Appeals erred by initially requiring proof of Montana's damages and costs.

Halper does not fit the facts of this case. "What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Halper*, 490 U.S. at 449. The Court

of Appeals cites the correct standard from *Halper*; but Montana has not imposed a fixed penalty, and there is nothing small-gauge about the Kurths' activities.

"If the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by Revenue, the Kurths are entitled to an accounting to determine if the sanction constitutes an impermissible additional punishment." *In re Kurth Ranch*, 986 F.2d at 1309. That is correct only if Montana's statute is truly a penalty and not a tax.

However, the Court of Appeals, without finding that the statute is or may be disproportionate, holds Montana responsible for making an accounting anyway. That is wrong. A defense to a tax assessment alleged to be a penalty should require some initial proof of disproportionality by the taxpayer. Where double jeopardy is asserted, the Defendant should at least be required to show in the first

place that the threat of a second punishment (rather than a remedial sanction) is real.

The facts of *Halper* illustrate that a sanction must be "overwhelmingly disproportionate" before it may constitute a second punishment. Halper filed 65 false Medicaid claims and cheated the government out of less than $600.00. The penalty sought against him was over $130,000.00. The fixed penalty of $2,000.00 per offense plus double damages was punitive as applied to *Halper* but is still appropriate in the ordinary case. *Halper*, 490 U.S. at 449; *United States v. Hess*, 317 U.S. 537 (1943).

In *Hess*, Justice Frankfurter thought that "the respondents here, ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the government's loss." *Id.* at 554. (Frankfurter, J., concurring). This is essentially the position adopted by the Court in *Halper*.

If a civil sanction appears overwhelmingly disproportionate on its face or as applied in a particular case, then the government must show its damages and costs in order to avoid the conclusion that the sanction is punitive and, therefore, barred by double jeopardy. In the absence of some preliminary showing by the Defendants from the statute or the facts of the case that a sanction is overwhelmingly disproportionate, the Court of Appeals was wrong to require Montana to prove proportionality. Otherwise, *Halper* becomes, not the rare case, but the routine.

B. The Court of Appeals erred in failing to find a proportionate, remedial effect.

If the Court determines that Montana's statute is only a penalty and that Montana must show in the first instance that the Kurths are not being punished in this case, Montana has met its burden. Even if Montana's tax were analyzed as a sanction, it has the proportionality which was

lacking in *Halper*.[3] Proportionality is built into the statute.

The excise tax in this case is much like familiar taxes on cigarettes and alcohol. Common knowledge of the health problems associated with all of these substances is more than enough justification for a proportionate excise tax, if any justification is needed. It is reasonable to remedy the harm done by the Kurths to Montana by imposing a proportionate tax rationally related to the economic value of their business.

The amount or rate of Montana's tax is not punitive, especially considering that taxable economic value may often escape the tax. Collection of the tax in the absence of an arrest is

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[3]The Court has also recently considered *Halper* in the context of forfeitures. *Austin v. United States*, 113 S.Ct. 2801 (1993). In *Austin*, the government sought to forfeit a business and mobile home following the sale of two grams of cocaine. The Court determined that the forfeiture statutes as a whole lacked proportionality because "the value of the ... property forfeitable ... can vary so dramatically that any relationship between the government's actual costs and the amount of the sanction is merely coincidental." *Id.* at 2812, n.14. The amount which the Kurths and other taxpayers are required to pay under the excise tax is not coincidental but is always directly related to the amount of substance which they possess.

unlikely because the usual tax enforcement requirements of permits, reports and record-keeping are problematic in view of concern about self-incrimination. *Marchetti* , 390 U.S. at 50-57. Certainly there is nothing to show that the Kurths had previously paid any tax on their activities, although the record shows that they cultivated marijuana as a large scale business for a year and a half before their arrest.

A tax of $100.00 per ounce of marijuana was a legitimate exercise of the taxing power in *Sanchez* and should be at least as non-punitive now as it was more than forty years ago. *Sanchez* 340 U.S. at 45.[4] It would be illogical to view a tax of 10% of market value as punitive when Montana can tax its coal at 30%. A 50% penalty on taxes attributable to illegally earned income does not violate double jeopardy. *Helvering v. Mitchell*, 303 U.S. 391 (1938). It would be odd to permit a penalty on taxes

[4]Inflation between 1950 and 1992, as measured by the Consumer Price Index for urban consumers, was approximately 484%. U.S. Dept. of Commerce, Bureau of Labor Statistics.

covering illegal activities and not permit recovery of the tax itself.

CONCLUSION

Montana's statute is a true tax and, as such, is not subject to a double jeopardy analysis appropriate only to disproportionate penalties. Even if Montana's statute is viewed as a sanction, it is proportionate and remedial on its face and as applied to the Kurths in this case. If the Court accepts the Court of Appeals' view of double jeopardy in this case, the difficulties of the states in administering their taxes and their sanctions may well be greatly multiplied.

The *amici* states respectfully ask the Court to reverse the Court of Appeals and hold that Montana's tax assessment is valid.

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